88-1313

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DR. PRADIP GHOSH,

Petitioner

v.

OHIO UNIVERSITY, DR. CHARLES PING,
DR. JAMES BURNING, and BOARD OF TRUSTEES
OF OHIO UNIVERSITY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the first amendment protects statements as matters of public concern which criticize state administrators' handling of public funds, university administration and minority rights made by public employees in a state sanctioned grievance involving their own claims.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are: Dr. Pradip Ghosh, Petitioner; Dr. Charles Ping, Dr. James Burning, and Board of Trustees of Ohio University, a state university in Ohio, Respondents.

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v.

OHIO UNIVERSITY, DR. CHARLES PING, DR. JAMES BURNING, and BOARD OF TRUSTEES OF OHIO UNIVERSITY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Dr. Pradip Ghosh, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on November 8, 1988.

OPINION BELOW

This memorandum opinion of the Court of Appeals is attached as Appendix A. Memorandum opinion of the United States District Court for the Southern District of Ohio is attached as Appendix B. Neither opinion is published.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was filed on November 8, 1988. The District

Court had original jurisdiction under 42 U.S.C. Secs. 1981 and 1983, 28 U.S.C. Sec. 1331 and the Sixth Circuit had jurisdiction under 28 U.S.C. Sec. 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS

AMENDMENT 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

AMENDMENT 14

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USCS Sec. 1983

> Sec. 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF FACTS

Dr. Pradip Ghosh, a Ph.D. Sociologist, Social Engineer and native of India, was hired by Ohio University as an "associate professor of Urban and/or Rural Development" in January 1980. In 1981 he taught a summer course for 12 students without pay. It later came to Petitioner's attention that another professor in his department taught only four students and yet was paid.

Dr. Ghosh looked into the matter of how and why he was not getting paid for summer school teaching while others were. He realized that there was always the chance that there was a legitimate explanation for his not being paid for work while others were. As a result of his inquiries the Petitioner discovered that his merit rating was dropped from 6 to 5 intentionally and this resulted in a lower salary increase. He believed these to be wrongdoings and straightforwardly filed a grievance on July 24, 1981 against Dr. Vattelle Rose, the head of the department, for violating his rights pursuant to the University's Faculty Handbook; complained about "mismanagement of academic programs in the department" and "mismanagement of department funds" such as paying $3,000 for a concert for 20 or 30 people to attend and spending University money (state funds) purchasing his own books, tape recordings and travel and paying for travels to members of other departments. He felt that Dr. Rose was "spending money, thousands of dollars, on nonacademic programs which should have gone for teaching activities".

Dr. Rose, not one to take such grievances sitting down, ended up recommending that Dr. Ghosh not be reappointed

to the University. Dr. Ghosh, who had received a favorable appraisal for 1980 got a marginal one after he filed his grievance. Then a veritable Greek chorus of administrators chimed in supporting Dr. Rose. During the presentation of grievances on August 18, 1981, Dean Dorrill *sternly warned Dr. Ghosh that he had better depart gracefully and that he would be terminated.* On October 15, 1981 Dean Borchert told the Petitioner that he was not going to be reappointed and that he should not pursue his grievances. As a result Dr. Ghosh, not surprisingly, received a written termination notice on November 18, 1981. It cited his "low productivity" in terms of teaching although he taught more credit hours than other members of the Department. Dr. Rose, however, admitted during the trial that his relations with Dr. Ghosh became so strained after the allegations of wrongdoing that "Dr. Ghosh and he were not talking" and also said that "There came a point where we were no longer on speaking terms." (App. D, pp. 26a-28a). The grievance against the chairman had everything to do with the deterioration of the relationship with Petitioner and his ability to supervise Dr. Ghosh.

Dr. Ghosh appealed his ill treatment through the appropriate committees. The appeal was referred to Dr. Calvin Thayer, Chairman of the Promotion and Tenure Committee which investigated the allegations. University officials testified that "no hearing was given to the plaintiff"; they did not "construct a list of reasons for the actions taken against Dr. Ghosh" to justify them; "Dr. Ghosh did not have the opportunity to ask questions of . . . witnesses" as that was not within the committee's prerogative." (App. D, pp. 29a-33a). Finally, the University's own witness, the chairman of the University Faculty Senate, established the fact that under the University Faculty Handbook, the Petitioner should have been allowed to continue working until June 30, 1983 but was terminated in November 1982 instead. Dr. Ghosh then filed suit in the United States District Court which

decided the case against him on constitutional grounds and that decision was upheld by the Sixth Circuit Court of Appeals in its November 8, 1988 unpublished decision.

REASONS FOR GRANTING CERTIORARI

This is the story of a public employee who was fired from his job for filing a formal grievance against his supervisor alleging mismanagement of public funds. Petitioner's statements that it was wrong to spend thousands of dollars on concerts and travel while not paying a teacher to teach is a matter of public and not private concern. Petitioner's allegations that a minority was discriminated against is also a matter of public concern. However, the Sixth Circuit held that Petitioner's grievances were private because the controversy "threatened a disruption" of a university department and "negatively impacted" upon the relationship between a teacher and his department head and was "in the setting of a private dispute". In so doing it has rendered a decision in conflict with a majority of other federal Courts of Appeals on the same matter and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court should take this opportunity to explain that the sensitivities of public officials and solicitude for their feelings by public institutions do not constitutionally overcome a public employee's rights to make his grievances known.

I. The Sixth Circuit's Decision Avoids Reciting the Facts of the Case in a Balanced Fashion and Thus Departed from the Accepted and Usual Course in Judicial Proceedings

The record before the District Court reflects that the thrust of the Petitioner's grievance to his department head was that the University could find money to spend on an elite group attending a concert and for travel but could not fund paying a professor for teaching a summer

school course and that the University treated a minority professor substantially less well than majority professors. The Sixth Circuit spoke only about the private nature of his dispute without letting the reader know that the grievance related to Petitioner's concern that a public university could find funds to send certain special people to concerts and on trips but not to pay a professor for teaching. This lack of balance is so severe as to call for an exercise of this Court's power of supervision because circuit courts cannot be allowed to work a result which denies individuals of a fair opportunity to vindicate their civil rights. Additionally, the Sixth Circuit even went so far as to criticize the District Court for determining that matters contained in a grievance, which is like a lawsuit, are not specially protected free speech. This conflicts with this Court's decision in *Cruz v. Beto*, 405 US 319, 92 S.Ct. 1079 (1972). *See also Inada v. Sullivan*, 523 F.2d 485 (7th Cir. 1975).

II. The Sixth Circuit's Decision Conflicts with Decisions of This Court and of Other Circuits on the Pickering Balancing Test

The Sixth Circuit substantially misapprehended the law on government employees' free speech rights in a number of regards. First, in *Pickering v. Board of Education, Illinois*, 391 U.S. 563, 88 S.Ct. 1731 (1968), this Court proclaimed the right of employees to speak as citizens on matters of public interest, but cautioned that the interests of the employee must be weighed against those of the employer in determining whether the speech is protected. Petitioner's grievance statements were of public interest because they went to the heart of financial mismanagement of a state university's finances which led to its not being able to pay for a teacher to teach. Second, in *Givhan v. Western Line Consolidated School District, et al.*, 439 U.S. 410, 99 S.Ct. 693 (1979), this Court clarified that freedom of speech is not lost to an employee who communicates privately with his or her

employer rather than to the public. The Sixth Circuit ignores this principle by characterizing Dr. Ghosh's grievance about mismanagement of funds and discrimination against minorities as being "private". Third, in *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), this Court established that an employee's right to free speech is lost if they speak as an employee rather than as a citizen on an issue which is not a matter of "public concern" and defined that term to embrace concepts of mismanagement as those articulated by Petitioner. Fourth, in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), this court ruled that an employee who has exercised the right of free speech can be subject to reprisal if the employer can demonstrate that she or he "would have" taken the action without the protected speech. The University, which was happy with Dr. Ghosh's performance before his complaints, found him to be so disruptive afterwards (allegedly as a result of those grievances) that he should be let go six months early and, according to a faculty committee, in violation of his substantive rights. And, fifth, in *Rankan v. McPherson*, 107 S.Ct. 2891 (1987), this Court further explained the context, which speech is constitutionally protected in employment cases and under its standards Dr. Ghosh's comments were protected.

A. The Decision Conflicts with the Pickering Balancing Test

This Court established the ground rules for freedom of speech for public employees in *Pickering*. In *Pickering*, a high school teacher challenged his retaliatory dismissal as a violation of his First Amendment right of free speech. The speech in question was a letter to the local newspaper in which Pickering criticized the school board's bond issue proposal and the allocation of funds between the educational and athletic programs. This Court held that Pickering's speech was constitutionally protected, and

that therefore his dismissal violated his First Amendment right of free speech.

However, this Court also acknowledged that the school board also had legitimate interests at stake, which must be weighed against those of the employee:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568.

Among the interests of the State are the need for harmony and discipline, the protection of close working relationships for which loyalty and confidence are necessary, the need for orderly administration, and the nature and content of the employee's statement and its effect of the employer. *Id.* at 569-70.

In holding that the interests of the teacher in *Pickering* outweighed those at the School Board, the Court stated, regarding the question of allocation of a school system's funds:

> On such a question, free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. *Id.* at 571-72, 88 S.Ct. at 1736.

B. The Decision Conflicts with Other Circuit's Application of the Pickering Balancing Test

The D.C. Circuit used the *Pickering* balancing test in *American Postal Workers Union, AFL-CIO et al., v. United States Postal Service*, 830 F.2d 294 (D.C. Cir. 1987), in which a postal worker challenged his discharge

for writing an article to a union newsletter in which he stated that he had discovered petitions seeking support for "right to work" legislation. In holding that the interests of the employee in making the speech outweighed the interests of the government in forbidding the speech, the Court held that "[g]iven the absence of any demonstrated harm caused by [the employee's] speech, [the employee] must prevail in the balancing of competing interests." *Id.* at 303.

Several other courts have used the *Pickering* balancing test in determining that reprisals against public employees violated the first amendment right of free speech. *See, e.g., Southside Public Schools v. Hill*, 827 F.2d 270 (8th Cir. 1987) (interest of teachers in complaining to state Department of Education of delay in implementing program for handicapped students outweighed interest of School Board of Education, 835 F.2d 1076 (4th Cir. 1987) (interests of teacher in speech supporting tenure for principal outweighed interest of School Board in avoiding turmoil, as the threat to discipline and harmony is less significant than the trampling of First Amendment rights). *Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986), *cert. den.*, 107 S.Ct. 2481 (principal's interest in criticizing superintendent's decision to transfer principal's wife outweighed school's interest in operating efficiently and productively; jury found that while there was a need for a close relationship between principal and superintendent, the speech did not and would not cause enough disharmony to jeopardize effective job performance); *Wren v. Spurlock*, 798 F.2d 1313 (10th Cir. 1986), *cert. den.*, 107 S.Ct. 1287 (teacher's interest in asking for investigation of principal for numerous offenses including sexual harassment of students and teachers as well as concern regarding high faculty turnover outweighed State's interest in efficient operation of school system); *Hamer v. Brown*, 831 F.2d 1398 (8th Cir. 1987) (university professor's inter-

est in making critical statements to an investigating committee concerning campus administration and allocation of funds outweighed interest of administration in suppressing speech; while criticism may detract from harmony and cohesion in the educational institution, it is not sufficient to override the employee's interest in speaking on matters of public concern).

Other courts using the *Pickering* balancing test to evaluate constitutionality of employee reprisals have struck the balance in favor of the employer. *See, e.g., Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 102 (interests of former captain in sheriff's department in openly supporting and campaigning for sheriff's political opponent, both outside and inside of the department, was outweighed by the public's interest in removing a source of disruption within the sheriff's department); *McMurphy v. City of Flushing*, 802 F.2d 191 (6th Cir. 1986) (interests of police officer in making allegedly untrue charges of official misconduct, and threatening and derogating police department and city officials, were outweighed by interests of city and police departments in efficient operation); *Kotwica v. Tucson*, 801 F.2d 1182 (9th Cir. 1986) (interests of agency in accurate expression of official policy outweighed interests of employee in speaking to press about project which was only tentative).

This Court and the properly decided cases under this Court's decisions place constitutionally protected speech in the form of grievances going to matters of public concern, such as complaints about the way public funds are or are not spent, above the personal sensitivities of public administrators. An administrator may feel badly because his judgment is called into question but that does not mean that he is then free to fire the grievant.

III. The Sixth Circuit Misapplied the Concept of "Public Concern"

A. The Decision Conflicts With Decisions of This Court

This court considered the issue of whether speech by an employee voicing employment grievances would be protected in *Connick v. Meyers*, 461 U.S. 138 (1983). In *Connick*, an Assistant District Attorney contested her dismissal on the grounds that it violated her first amendment right to free speech. Meyers, the Assistant District Attorney, had contested the transfer proposed by Connick, the District Attorney; nevertheless, the transfer became final. *Id.* at 140-41. In protesting the transfer to a first District Attorney, Meyers also discussed a number of office matters, and was told that her concerns were not shared by others in the office. *Id.* at 141. In response to this comment, Meyers prepared and later distributed a questionnaire in which she asked the views of her co-workers on such matters as transfer policy, office morale, level of confidence in supervisors, the need for a grievance committee, and whether employees felt pressured to work on political campaigns. *Id.* Shortly after she distributed the questionnaire, Meyers was dismissed for refusing to accept the transfer and for insubordination. *Id.* This Court held that the questionnaire was primarily a personal employee grievance, not a matter of public concern, and furthermore such speech had the potential to disrupt agency effectiveness. Matters at issue "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *id.* at 146, are not "public concerns" and consequently are not protected free speech.

While the Court acknowledged that the question regarding pressure to support political campaigns is a matter of public concern, it held that in examining the content, form, and context of the questionnaire as a whole, the speech was appropriately viewed as a personal

employee grievance. *Id.* at 154. Significantly, the Court did not hold that speech regarding private concerns should be denied all protections, but stated:

> We hold only that when a public employee speaks not as a citizen upon matters *only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Id.* at 147. (Emphasis supplied)

In *Rankin v. McPherson*, 107 S.Ct. 2891 (1987), the Court emphasized that an employee's speech be considered as a whole when deciding if it is a matter of public concern and, therefore, protected. *Id.* at 2897-2898. It stated that the lower an employee is on the employment scale, the less threatening that employee's speech is to the functioning of an office. *Id.* at 2900. It also stressed that a purely private statement by a public employee on a matter of public concern will rarely, if ever, justify the discharge of an employee. *Id.* at 2896.

This Court stated that a comment about hoping that "they should get [President Reagan]" justified first amendment protection, thus passing the *Connick* test, because it was part of a whole conversation that dealt with issues of public concern—namely, both the President's health and his policies. It rejected the employer's claim that the speech amounted to an illegal threat to kill the President, and said that the constable could not isolate the comment by asking the employee to repeat it, thus re-emphasizing the *Connick* requirement to analyze the "context" in which the comment was made. *Id.* at 2897; *See also Connick* at 147-148. The Court emphasized the fact that the employee's job was not a high profile one, saying that "the danger to the agency's successful function . . . is minimal" when the employee holds a lower place in the office. *Id.* at 2899. In a separate concurring opinion, Justice Powell succinctly

stated the reasons for balancing the free speech issue in the employee's favor: "The risk that a single, off-hand comment directed to one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful." *Id.* at 2901. He stressed that it was the unimportance of the comment that persuaded him to balance the interests in favor of the employee. *Id.* at 2901.[1]

B. The Decision Conflicts With Those of Other Circuits

Several courts addressing the issue of freedom of speech for public employees have used the *Connick* threshold analysis to determine that the subject of the speech was a matter of public concern and therefore protected. In *Piver v. Pender County Board of Education*, 835 F.2d 1076 (4th Cir. 1987), the speech in question was supported by a teacher for the school's principal's tenure. The Court held that speech on this issue was a matter of public concern, as it was an issue about which the community was "vitally interested." *Id.* at 1080. Discussing the question of "public concern," the court stated that:

> *Pickering*, its antecedents, and its progeny—particularly *Connick*—make it plain that the 'public concern' or 'community interest' inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that *all* public employee speech that by content is within the

[1] In his dissent, Justice Scalia found the majority opinion "irrational." He believed that, not only had the employee meant to threaten the life of the President, but that the Court's entire *Pickering* analysis was faulty. He was concerned mainly with the Court's conclusion that a nonpolicymaking employee should have wide latitude in speaking out. As he stated, "If today's decision is to be believed (nonpolicymaking employees) can never be disciplined for statements that fall within the Court's expanded definition." *Id.* at 2904.

> general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely, 'personal concern' to the employee—most typically, a private personnel grievance . . . The focus is therefore upon whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee. *Id.* at 1079-80.

Several other courts applying the *Connick* threshold test have ruled that the speech in question involved a matter of public concern. *See, e.g., Hamer v. Brown*, 831 F.2d 1398 (8th Cir. 1987) (statements critical of campus spending and administration made by university professor to investigating committee were protected speech); *Southside Public Schools v. Hill*, 827 F.2d 270 (8th Cir. 1987) (letter to State Department of Education complaining of delay in implementing programs for handicapped students was protected); *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096 (5th Cir. 1987) (testimony by administrator in teachers' civil suit against superintendent and school board was protected speech); *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987) (statements to the press by Department of Food and Drug entomologist regarding agricultural report on medfly infestation with results different from those of the Agency, and suggesting possible agency incompetence or abuse, were protected speech; statements which concern

> issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection;

Kotwica v. Tucson, 801 F.2d 1182 (9th Cir. 1986) (statements to the press regarding recreation program that was merely tentative, and not official department

policy, were a matter of public concern). *Contra., Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986) (criticism by teacher of school policies, including collegiate registration and the teaching of certain subjects by teachers who were not certified in those subjects, were not protected by speech; burden was not on administrators to demonstrate that teacher's speech related merely to personal concerns, but on teacher to demonstrate by examining content, form, and context of speech that statements related to matters of public concern).

It is clear from the history behind the First Amendment and this Court's decisions under it that public officials may not like, and indeed may be repulsed by, what others have to say. However, that is a fair and legitimate price for living in a free and open society. Ohio University and the Sixth Circuit have placed those noble concepts on the guillotine of their dislike and have executed them.[2]

CONCLUSION

This Court should grant Petitioner's Petition for a Writ of Certiorari and for such other and further relief as it deems appropriate.

Respectfully submitted,

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[2] Petitioner was not afforded any due process rights by Ohio University. He was never given notice of the charges against him; he was not free to call witnesses; the "fact finders" were also his accusers; and there was no hearing. See *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 490, 96 S.Ct. 2308, 2313, 49 L.Ed.2d 1 (1976), and *Kendall v. Board of Education of Memphis City*, 627 F.2d 1 (6th Cir. 1980).

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-3899/4115

DR. PRADIP GHOSH,
Plaintiff-Appellant (3899)
Plaintiff-Appellee (4115),

v.

OHIO UNIVERSITY, DR. CHARLES PING,
DR. JAMES BRUNING, and BOARD OF TRUSTEES
OF OHIO UNIVERSITY,
Defendants-Appellees (3899).
Defendants-Appellants (4115)

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed Nov. 8, 1988

Before: WELLFORD and BOGGS, Circuit Judges; and BROWN, Senior Circuit Judges.

PER CURIAM. This is an action for equitable relief under 42 U.S.C. §§ 1981 and 1983. Plaintiff-appellant, Pradip K. Ghosh ("Ghosh"), sought reinstatement to his position as a nontenured professor of Afro-American Studies at Ohio University. Ghosh claimed that Ohio University discriminated against him based on his national origin (Indian), refused to renew his teaching

contract in retaliation for exercising his first amendment rights, and denied him due process of law by refusing to allow him to respond to an unfavorable letter written during the process of his department's reappointment evaluation.

After the district court held in favor of Ohio University on all issues, Ghosh appealed on his first amendment and due process claims, but did not pursue further the decision denying his national origin claim. Ohio University also sought to recover attorneys' fees under 42 U.S.C. § 1988. The request was denied and Ohio University cross-appealed.

For the reasons stated below, we affirm the decision of the district court.

I. BACKGROUND

Ghosh, a native of India, has resided in the United States for over twenty years and holds a Ph.D. in Sociology and Social Engineering from the University of New York at Buffalo. In June 1979, while teaching at Southern University in Louisiana, Ghosh responded to an ad in the *Chronicle of Higher Education* announcing the availability of a position as "assistant/associate professor of Urban and/or Rural Development." This ad was placed by the Center for Afro-American Studies at Ohio University, which held the status of a separate college at the time. Ghosh was hired to fill this position, with the understanding that one of his responsibilities would be to establish an Institute for Urban and Rural Studies to help boost enrollment. Before arriving at Ohio University, Ghosh unsuccessfully sought a grant from the National Science Foundation to help fund the proposed Institute.

Ghosh arrived at Ohio University in January 1980. Due to low enrollment and the resignation of its dean, the Center for Afro-American Studies was merged into

the College of Arts and Sciences on July 1, 1980. Interest in developing an Institute for Urban and Rural Studies faded, and the effort was "combined" with an existing effort to develop an institute focusing solely on rural affairs. This rural "institute-in-formation" was begun in 1976 by Mark Weinberg, who had successfully obtained grants and other outside funding for this program. Although Ghosh was invited to join the steering committee and to help establish the rural studies institute, his participation with the steering committee was minimal. Ghosh was upset when Weinberg, a white whom Ghosh felt was less qualified than he, was formally selected by the University to coordinate the institute in September of 1980. Ghosh complained to the Dean about Weinberg's selection, but to no avail.

In 1980, Dr. Rose, the head of Ghosh's department, gave Ghosh a favorable performance evaluation. By 1981, however, the relationship between Ghosh and the University had begun to deteriorate. Ghosh had, in the interim, complained about a graduate summer school course that he was scheduled to teach which was cancelled due to insufficient enrollment. Ghosh agreed to teach the course without pay, a not uncommon situation among professors teaching summer school. Ghosh also had become upset when he discovered that another professor, who was teaching an undergraduate course which had been cancelled due to lack of enrollment and then rescheduled, was being paid for her efforts even though she was teaching fewer students than he was teaching. In August 1981, Ghosh sent a series of letters to the administration demanding that he be paid. The University explained that the decision to pay certain professors to teach classes that initially had been cancelled due to lack of enrollment was based on whether the course was essential to a certain major. The Dean's office decided that the undergraduate course was a core course but that Ghosh's graduate course was not a core course.

Also in 1981, Ghosh's merit rating was lowered from a six to a five (on a ten-point scale). Dr. Rose initially gave Ghosh a score of six. When Dean Dorrill received Rose's evaluation he felt that Rose had overevaluated Ghosh and requested him to reconsider the recommendation.[1] Rose lowered Ghosh's evaluation. The lowered evaluation resulted in the reduction of Ghosh's salary for the upcoming teaching year.

On July 24, 1981, Ghosh wrote a letter to Dr. Rose complaining about the reduction of his faculty evaluation rating and on the same date, he wrote to Associate Dean Borchert objecting to the cancellation of his summer course and requesting payment for his teaching effort. Ghosh characterized these letters as grievances. Because Ghosh was not satisfied with the responses he received to either letter, he brought these matters to the attention of Dean Dorrill in a meeting held in August of 1981. In August, he also wrote to Acting Provost, James Bruning, regarding the nonpayment of summer teaching. In that letter, Ghosh claims that Dean Dorrill threatened him with termination for filing these grievances and further alleges that the nonrenewal of his teaching contract was in retaliation for filing these grievances.

On November 14, 1981, Ghosh was notified that his teaching contract would not be renewed beyond November of 1982. This decision was based upon the results of a standard evaluation procedure wherein a committee consisting of the chairman and two tenured faculty members of the Center for Afro-American Studies evaluated Ghosh's performance. Ghosh was invited to appear before the committee, but he declined to do so. After reviewing Ghosh's performance, the committee recommended nonrenewal. This recommendation was based upon lack of student enrollment in Ghosh's courses,

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[1] Rose also was asked to re-evaluate the ratings he gave to two other professors.

Ghosh's failure to develop courses appropriate to the curriculum of Afro-American Studies, and his lack of interest in re-orienting his efforts toward Afro-American Studies.

The department of Afro-American Studies also requested the Dean's office to evaluate Ghosh's administrative performance. This task was assigned to Associate Dean Borchert, who then proceeded to investigate Ghosh's performance with various deans, department chairmen, and faculty members who had worked with Ghosh. Borchert also reviewed Ghosh's personnel file. On August 4, 1981, Dean Borchert reported that Ghosh had "failed entirely to demonstrate the qualities of leadership skill necessary."

On December 4, 1981, Ghosh submitted a formal grievance to Dean Dorrill wherein he outlined his version of the various events which had occurred during his employment at Ohio University. Ghosh's grievance was treated as a nonreappointment grievance under section II(D)(6) of the Ohio University faculty handbook. Dean Dorrill responded in detail to each of the allegations contained in Ghosh's grievance and concluded:

> Having assessed very carefully your submitted materials relative to your non-reappointment grievance, I am led to the conclusion that your claims of broken commitments and conspiracy are without foundation in fact, and that your grievance merits no redress.

After receiving Dean Dorrill's response to his grievance, Ghosh appealed the matter to the University Provost, Dr. James Bruning, who asked Associate Provost, Dr. David Stewart, to assist him in reviewing Ghosh's grievance and the Dean's response. Dr. Stewart reviewed and analyzed both documents and recommended that the Dean's decision be sustained. The Provost concluded that there were no grounds for the grievance, and

informed Ghosh that he concurred with Dean Dorrill's response to his grievance.

Ghosh then appealed his grievance to the faculty senate. The appeal was referred to Dr. Calvin Thayer, Chairman of the Promotion and Tenure Committee. Dr. Thayer's committee investigated Ghosh's grievance to determine whether or not there had been a violation of academic freedom, a failure to adequately consider his complaints, or a violation of due process as claimed by Ghosh. A meeting was scheduled with Ghosh, and all eight members attended and asked questions. The committee conducted its own investigation and personally interviewed Dean Porter, Professor Rose, Dean Borchert, Dean Dorrill, and others. The committee issued its report to the chairman of the faculty senate finding unanimously that Ghosh's substantive rights under the faculty handbook had been violated. The district court found that Ghosh's grievance was handled in accordance with the Ohio University faculty handbook procedures.

II. FREEDOM OF SPEECH

The first issue considered was whether the nonrenewal of Ghosh's contract was an act of retaliation infringing on his first amendment rights. When a public employee claims that his dismissal deprived him of a constitutional liberty interest without due process, the reviewing court must engage in a multistage analysis. First, the employee must demonstrate that his conduct was protected. Second, the employee must demonstrate that the protected conduct was a substantial or motivating factor in the decision to dismiss. Finally, the employer may show that the dismissal would have occurred even in the absence of the protected conduct. *See Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216, 219 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court established a qualified pro-

tection for the speech of public school teachers. *Pickering* mandated a balancing test to determine when a public school teacher may communicate in public without fear of retaliation by the state. The test recognizes that a state "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Although the Court did not furnish absolute guidelines, it indicated that the employee's interest in expression must be weighed against the employer's expectations of "promoting the efficiency of the public services it performs through its employees." *Id.*

In 1983, the speech protection afforded public employees was narrowed significantly by *Connick v. Myers*, 461 U.S. 138 (1983). As articulated in *Pickering*, the employee must show that his activity was protected. Under *Connick*, this initial issue involves two subordinate inquiries of law: (1) whether the conduct involved a "matter of public concern," and (2) whether the employee's right of communication outweighed the efficient operation of the public employer.

Connick concluded that the "public concern" factor was paramount in the balancing test. Federal courts should review a personnel decision of a public employee only when it involves the employee's speech about matters of *public* concern. *Id.* at 147-48. Absent an issue of public concern, courts need not address the remaining balancing considerations, and *Pickering* protection does not apply. *Id.* Unfortunately, the Court failed to set forth a clear standard for identifying a matter of "public concern"; each such determination must be made on an *ad hoc* basis.

Given the facts in *Connick*,[2] the Court concluded that the "government's interest in the effective and efficient

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[2] The plaintiff in *Connick* was an assistant district attorney in New Orleans. Because she objected to a transfer to a different

fulfillment of its responsibilities to the public" outweighed the plaintiff's first amendment protection. Even though the plaintiff's speech was constitutionally protected, she was a public employee speaking "not as a citizen" and on matters "only of personal interest." *Id.* at 150-54.

> *Connick* broadens the restriction upon a public employee's communication particularly when criticizing aspects of employment. Generally, courts will not protect commentary respecting internal policies —work-site criticism. The Court's narrow scope of protected speech appears to "give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation. . . ." The majority in *Connick* "reacted to what it perceived to be a vertiable flood of personnel disputes that diverted an inordinate quantity of judicial resources."

Matheson, *A Peacock's Tale: Due Process and Free Speech in Academe*, 1986 Ariz. St. L.J. 401, 438-39 (footnotes omitted).

The Court in *Connick* provided little guidance in determining whether an issue is one of public or private concern. According to the Court, whether a particular communication addresses a matter of public concern is determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Because this inquiry constitutes a question of law, the reviewing court must independently evaluate an employee's speech in each case.

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sector of the criminal court, she prepared a questionnaire and distributed it to her office collegaues. The questionnaire sought reactions to the office transfer policy, office morale, lack of confidence in supervisors, the need for a grievance committee, and possible pressure to work in political campaigns. Her supervisors immediately fired her when they learned of the questionnaire.

Although the courts have experienced difficulty in applying the *Connick*, some agreement is developing. Courts tend to identify internal employment squabbles involving salary, course assignments, and teaching evaluations as matters of only private interest or as extensions of purely private disputes. *See, e.g., Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984); *Ballard v. Blount*, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir. 1984). On the other hand, speech related to exposing waste, ineptitude, breach of public trust, or danger to the public in government, *see Connick*, 461 U.S. at 146-49; electorate issues to inform public date, *see Pickering*, 391 U.S. at 568-72; and academic standards, *see Johnson v. Lincoln University*, 776 F.2d 443, 452 (3d Cir. 1985), are matters of public concern.

The district court erroneously held that Ghosh's grievances warranted first amendment protection because they were akin to filing a lawsuit. *Ghosh v. Ping*, No. C-2-82-1356, slip op. at 14 (S.D. Ohio Aug. 26, 1987). The court should have focused on whether Ghosh's speech concerned a matter of public or private concern. *Connick v. Myers*, 461 U.S. 138 (1983). Ghosh's grievances were private: the controversy was in the setting of a private dispute, disruption in the Afro-American Studies Department was threatened, and there was a negative impact on a close working relationship (Ghosh and his department head were not on speaking terms after the events described above). Ghosh's grievances, moreover, concerned a teaching evaluation and a tenure/nonrenewal decision. Other courts have classified these matters as private concerns. *See Renfroe*, 722 F.2d at 715; *Ballard*, 581 F. Supp. at 164-65. Ghosh's grievances did not address any matter of public concern.

III. LIBERTY INTEREST

The second issue addressed was whether Ghosh's liberty interest was violated. In *Board of Regents v. Roth*, 406

U.S. 564, 573-74 (1972), the Supreme Court stated that a person is deprived of a liberty interest when his reputation is stigmatized or when actions are taken that foreclose his opportunity to secure other employment. Later rulings, however, indicate that the Court has narrowed the scope of the liberty interest in procedural due process settings. For example, an assault upon another's reputation, without a more tangible alteration of legal status, such as the accompanying loss of employment, may not be sufficient to trigger constitutional protection. *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *see also Codd v. Velger*, 429 U.S. 624 (1977) (holding that an employee has a right to a hearing only if the employer proceeds on the basis of substantially false allegations).

Wells v. Doland, 711 F.2d 670 (5th Cir. 1983), provides an example of a liberty interest in reputation. Professor Wells sued the president of the university that refused him tenure and terminated his employment. Wells alleged that the reasons given for his termination attacked "his good name, reputation, and integrity so as to possibly deprive him of future state employment [and] caus[ed] damage to his professional reputation." *Id.* at 673. In reversing the district court's summary judgment for Wells' employer on the liberty issue, the Fifth Circuit held that Wells was entitled to an opportunity to prove certain elements of impairment: (1) That he was stigmatized; (2) that the stigma was part of the discharge process; (3) that the charges were made public; and (4) that he was denied a meaningful hearing to clear his name. *Id.* at 676. On remand, the district court was required to order the university to provide Wells with a hearing to clear his name, if these four elements of liberty impairment were established.

Assuming that the employee can demonstrate a liberty deprivation, he further must demonstrate that the deprivation occurred without due process of law. First, the employee is entitled to some type of predetermination hearing. *Cleveland Board of Education v. Loudermill*,

470 U.S. 532 (1985).[3] Although this hearing need not definitely resolve the propriety of the dismissal, it should permit a "determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46. It must include oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story. *Id.*

Ghosh claimed that the letter written by Dean Borchert implicates a liberty interest. We disagree because the letter did not tend to stigmatize his reputation or foreclose opportunity to secure other employment. Although Ghosh experienced difficulty locating other employment, this was attributable to existing market conditions rather than the letter. Ghosh never demonstrated, moreover, that the letter was publicized or shown to anyone outside the University.

It is doubtful that a liberty interest was involved, but if we assume that it was, Ghosh still received sufficient due process. At every stage of the administrative review, Ghosh was given notice and an opportunity to present his side of the story.

IV. ATTORNEYS' FEES

Ohio University contends that it is entitled to attorneys' fees under 42 U.S.C. § 1988 "upon a finding that [Ghosh's] action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). We conclude that plaintiffs' claims were not frivolous. Thus, the district court's refusal to award fees to Ohio University is AFFIRMED.

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[3] Although *Loudermill* involved deprivation of a property interest, the same analysis should apply to deprivation of a liberty interest.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-72-1356
JUDGE GRAHAM

DR. PRADIP K. GHOSH,
Plaintiff,

vs.

DR. CHARLES PING, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for equitable relief under 42 U.S.C. §§ 1981 and 1983. Trial to the court commenced on August 6, 1987 and concluded on August 8, 1987.

Plaintiff, is a native of India who was employed as an associate professor at Ohio University from January 1, 1980 to November 24, 1982. The defendants in this case are Charles Ping, President of Ohio University; James Burning, Provost of Ohio University, and the Board of Trustees of Ohio University.

Plaintiff claims that the defendants discriminated against him on the basis of his national origin by (1) hiring a white male as director of the Institute for Local Government Administration and Rural Development, (2) by lowering his merit rating, (3) by refusing to pay him for teaching a course during the summer session of 1981 and (4) by non-renewing his teaching contract and terminating his employment. Plaintiff further claims

that the defendants abridged a liberty interest without due process of law by denying him a hearing with regard to a letter written by the associate dean of the College of Arts and Sciences which was critical of plaintiff's administrative abilities. Finally, plaintiff claims that the non-renewal of his teaching contract was an act of retaliation by the defendants for his actions in filing grievances against the chairman of his department and the associate dean of the College of Arts and Sciences and that in so doing defendants violated his First Amendment rights.

FINDINGS OF FACT

1. Pradip Ghosh is a native of India. He has been a resident of the United States for 20 years and he has a Ph.D. in Sociology and Social Engineering from the University of New York at Buffalo.

2. In June of 1979, plaintiff responded to an ad in the *Chronicle of Higher Education*, which announced the availability of a position as "assistant/associate professor of Urban and/or Rural Development." This advertisement was placed by the Center for Afro-American Studies of the Ohio University which then held the status of a separate college of the university. At this time, the Center for Afro-American Studies was experiencing low enrollment and was seeking to broaden its areas of interest and expertise. As part of this project, its dean, Thomas J. Porter, desired to establish an Institute for Urban and Rural Studies. Plaintiff was selected for the advertised position with the understanding that one of his responsibilities would be to establish such an institute.

3. Upon plaintiff's arrival at Ohio University in January, 1980, he was immediately met with a changed situation. Dean Porter was resigning his deanship and instead of expanding its role, the Center for Afro-American Studies was in the process of being merged into the College of Arts and Sciences as a department

of that college, thus losing its status as an independent college of the university. This transition occurred on July 1, 1980. At that point the department no longer had a mandate or an interest in developing an Urban and Rural Development Program. The funds and responsibility for such a program had been transferred to William Dorrill, Dean of the College of Arts and Sciences.

4. In 1976, the university hired Mark Weinberg as an associate professor in the Department of Government which is now the Department of Political Science. One of his responsibilities was to help establish an institute of local government which was to be molded after a similar one that he was familiar with at the University of North Carolina. He began work on this project soon after assuming his duties at the university and he involved other faculty members in the project. Work on this project continued on an *ad hoc* basis with members of various departments. The work of these faculty members became more focused under the leadership of Dean Dorrill of the College of Arts and Sciences who had arrived on the campus in 1977.

5. When the Center for Afro-American Studies was transferred into the College of Arts and Sciences, plaintiff expected to continue to pursue the development of his Institute for Rural and Urban Development and he expected to be the coordinator of this project and ultimately the director of the institute. There were similarities between his project and the Weinberg project and when he discovered that Dean Dorrill had been meeting with a committee which was discussing the formation of an institute for local administration and urban development, he apparently concluded that this was a usurpation of his role and his institute. When plaintiff indicated his desire to be involved with this committee, Dean Dorrill appointed him to the committee and he began attending its meetings. Ultimately, however, Mark Wein-

berg was selected as coordinator and later as director of the institute which was finally known as the "Institute for Local Government Administration and Rural Development." The focus of the institute was away from the urban development interests of the plaintiff.

6. The selection of Weinberg by Dean Dorrill was not motivated by any consideration of plaintiff's national origin. Weinberg was the logical selection. He had excellent administrative skills and a fine academic record. Because he had been working on the project since 1976 and in a leadership role for several years, he was the most qualified person for the position of coordinator and director.

7. Plaintiff on the other hand, elected to leave the campus and spend two months in India during the summer of 1980 just when the final work on the project was being completed. Accordingly, plaintiff was not available to make a contribution during this crucial period of the committee's work. Furthermore, the National Science Foundation Funding Proposal plaintiff had prepared for his own institute had been rejected with critical comments by the NSF evaluators. For these and other reasons Dean Dorrill was justified in considering Mark Weinberg as better qualified for the position of coordinator and director of the new institute.

8. Dr. Vatel Rose, Chairman of the Department of Afro-American Studies was required to evaluate the faculty members under his supervision. In 1981 he originally evaluated the plaintiff at a level of six on a ten point scale. When Dean Dorrill received and reviewed Dr. Rose's faculty evaluations he felt that Dr. Rose had over-evaluated the plaintiff and he requested that Dr. Rose reconsider his evaluation. As a result, Dr. Rose did reconsider the plaintiff's evaluation and reduced it to a five. This resulted in some reduction of plaintiff's salary for the next teaching year.

9. Dean Dorrill asked Dr. Rose to re-evaluate not only the plaintiff, but two other department members and his reduction of the plaintiff's rating was based upon his review and reconsideration of the plaintiff's performance. There was no evidence that the actions of Dean Dorrill or Dr. Rose in any way were influenced by a consideration of plaintiff's national origin and the court finds that they were not.

10. In the summer of 1981, plaintiff planned to teach a graduate level course in Afro-American Studies, however, the course was cancelled because an insufficient number of fee-paying students signed up for the courses. After being advised of this fact by Associate Dean Borchert, plaintiff offered to teach the course without payment and proceeded to do so. Later plaintiff discovered that the College of Arts and Sciences had authorized an undergraduate course in Afro-American Studies that summer and the teacher of that course was paid even though the number of students who enrolled for the course did not meet the standard. However, there was a long standing policy to authorize the teaching of certain essential courses regardless of enrollment and this particular course qualified for such treatment. The course being taught by plainitff was not a course as such but a program of independent studies by a group of graduate students and plaintiff's course did not qualify for special treatment under the existing university policy. It is not unusual for faculty members to teach independent studies during the summer (or the rest of the year for the matter) without payment of salary on a voluntary basis. The cancellation of plaintiff's summer course and the non-payment for his teaching services was in no way related to his national origin.

11. On November 14, 1981, plaintiff was notified that his teaching contract would not be renewed beyond November of 1982. This decision was based upon the results of a standard evaluation procedure wherein a com-

mittee consisting of the chairman and two tenured faculty members of the Center for Afro-American Studies evaluated plaintiff's performance. Plaintiff was invited to appear before the committee, but he declined to do so. After reviewing the plaintiff's performance the committee recommended non-renewal. This recommendation was based upon lack of student enrollment in plaintiff's courses, plaintiff's failure to develop courses appropriate to the curriculum of Afro-American Studies and his lack of interest in reorienting his efforts toward Afro-American Studies. Plaintiff's national origin was not a factor in the committee's recommendation, nor in the decision of the dean to accept such recommendation.

12. In connection with plaintiff's evaluation for renewal or non-renewal of his teaching contract, the department of Afro-American Studies requested the dean's office to evaluate plaintiff's administrative performance. This task was assigned to Associate Dean Borchert who then proceeded to talk to various deans, department chairmen and faculty members who had worked with the plaintiff. Borchert also reviewed the plaintiff's personnel file and obtained direct input from Dean Dorrill. He then prepared a letter to Dr. Rose, Chairman of the Department of Afro-American Studies setting forth his findings. (Plaintiff's Exhibit 44). This letter is dated November 4. Associate Dean Borchert in the letter that the plaintiff had "failed entirely to demonstrate the qualities of leadership and administrative skill necessary." The facts reported in this letter are supported by the evidence adduced at the trial of this case.

13. On December 4, 1981, plaintiff submitted a formal grievance to Dean Dorrill wherein he outlined in considerable detail his version of the various events which had occurred since he arrived at Ohio University in January of 1980. In paragraph 39 of this grievance, plaintiff states that Dean Borchert's letter of November 4, 1981 "*does not contain a single truth.* A careful evaluation

of the evidence as presented in this document will justify my conviction." (Emphasis in the original). This grievance was received by Dean Dorrill who reviewed it at length with the assistance of Associate Dean Borchart. Plaintiff was given a written reply dated January 4, 1982. (Joint Exhibit 4). Plaintiff's grievance was treated as a non-reappointment grievance under Section II(D)(6) of the Faculty Handbook of Ohio University. Dean Dorrill responded in detail to each of the allegations contained in the plaintiff's grievance and concluded by stating:

> Having assessed very carefully your submitted materials relative to your non-reappointment grievance, I am led to the conclusion that your claims of broken commitments and conspiracy are without foundation in fact, and that your grievance merits no redress.

14. After receiving Dean Dorrill's response to this grievance, plaintiff appealed the matter to the Provost, Dr. James Burning, who asked Associate Provost, Dr. David Stewart, to assist him in reviewing the plaintff's grievance and the dean's response. Dr. Stewart carefully reviewed and analyzed both documents and reported to the provost recommending that the dean's decision be sustained. The provost concluded that there were no grounds for the grievance and responded to the plaintiff in writing informing him that he concurred with Dean Dorrill's response to his grievance. (Joint Exhibit 5).

15. Plaintiff then appealed his grievance to the faculty senate. The appeal was referred to Dr. Calvin Thayer, Chairman of the Promotion and Tenure Committee. Dr. Thayer's committee thoroughly investigated plaintiff's grievance to determine whether or not there had been a violation of academic freedom a failure to adequately consider his complaints or a violation of due process. A meeting was scheduled with the plaintiff and all eight

committee members attended and asked questions. The committee then conducted its own investigation and personally interviewed Dean Porter, Professor Rose, Dean Borchert, Dean Dorrill and others. The committee then met privately and deliberated on the issues raised by the plaintiff. Altogether the committee met twelve to fifteen times. On May 17, 1982, it issued its report to the chairman of the faculty senate finding no substantive violation of the plaintiff's rights under the faculty handbook. The decision of the committee was unanimous.

16. Plaintiff's grievance was handled in accordance with the procedures outlined in the Faculty Handbook of Ohio University. Plaintiff's complaints received the attention and consideration of the dean of his college, the provost of the university and the faculty senate and he was accorded due process with respect to the issues raised.

17. On July 24, 1981, plaintiff wrote a letter to Dr. Rose complaining about the reduction of his faculty evaluation rating and on the same date, he wrote to Associate Dean Borchert objecting to the cancellation of his summer course and requesting payment for teaching it. Plaintiff characterizes these letters as grievances. He was not satisfied with the responses he received to either letter and brought these matters to the attention of Dean Dorrill in a meeting in August of 1981. In August, he also wrote to Acting Provost, James Bruning, regarding the non-payment of summer teaching. Plaintiff claims that Dean Dorrill threatened him with termination for filing these grievances and further alleges that the non-renewal of his teaching contract was in retaliation for filing these grievances. The evidence established, however, that the non-renewal of plaintiff's teaching contract was based upon the recommendation of the committee appointed for that purpose and that the committee based its recommendation on the factors outlined in paragraph 11 above. The court finds that there

was no causal relationship between plaintiff's grievances of July 24th and August 6th and the non-renewal of his teaching contract.

CONCLUSIONS OF LAW

1. In order to prevail in an action brought under 42 U.S.C. § 1981, the plaintiff must prove by a preponderance of the evidence that he is a member of a protected class, that he has been injured by some unfavorable action by the employer and that the unfavorable action was taken because of the plaintiff's race or national origin. See: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff must prove that the defendant intended to discriminate against him on the basis of race or national origin. *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 3575 (1982); *Saint Francis College v. Al-Kharraji, 107 S. Ct. 2022 (1987)*.

2. Plaintiff may establish a *prima facie* case by proving facts which give rise to an inference of unfavorable treatment as a result of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a non-discriminatory reason for the particular employment decision in question and upon doing so, plaintiff, in order to sustain his burden of proof, must show that the non-discriminatory reason given by the defendant was a mere pretext for discrimination. *Firnco Construction Corp. v. Waters*, 438 U.S. 567, (1978); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

3. The order and allocation of proof applicable in a Title VII disparate treatment analysis may be utilized in adjudicating claims arising under 42 U.S.C. §§ 1981, 1983, *Daniels v. Board of Education*, 805 F.2d 203 (6th Cir. 1986). The plaintiff can show discrimination based

upon race or national origin if he were treated differently than similarly situated non-minority employees under the same or similar circumstances or if plaintiff can prove any other fact or circumstance which would give rise to an inference that his treatment by the defendants was racially motivated.

4. Plaintiff did not show that the defendants engaged in a pattern of racial discrimination. See: *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). Nor did plaintiff prove any facts that would give rise to an inference that the negative employment decisions of which he complains were motivated by discrimination based upon his national origin.

5. Assuming *arguendo* that plaintiff did establish a *prima facie* case as to refusal to renew his contract, reduction of his rating, refusal to pay for summer teaching and refused to appoint him as coordinator for the Institutute for Local Administration Rural Development, the court finds that in each instance defendants have articulated a valid, nondiscriminatory reason for the actions taken and that the plaintiff has failed to provide any evidence whatsoever that the reasons given were a pretext for discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Burdine*, 450 U.S. at 233.

6. In order to state a claim for retaliation for the exercise of a First Amendment right, the plaintiff must first establish that his conduct deserves constitutional protection. This is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138 (1983). The court holds that filing a grievance in the form of letters to Dean Dorrill and Dr. Rose in July, 1981 and to Acting Provost Bruning in August, 1981, is akin to filing a lawsuit and is a species of the First Amendment right to petition. *Graham v. National Collegiate Athletic Association*, 804 F. 2d 953 (6th Cir. 1986); *Harrison v.*

Springdale Water & Sewer Commisison, 780 F. 2d 1422 (8th Cir. 1986).

7. Since the court finds that Dr. Ghosh's conduct was protected by the First Amendment, it must determine whether there is any evidence that negative actions were taken against him because he engaged in the protected conduct. The plaintiff has the burden of proving that his exercise of protected First Amendment rights was a "motivating or substantial factor" in the employer's adverse employment decisions. If the employee meets this burden of proof, then the defendants must prove by a preponderance of the evidence that any actions taken against the employee would have taken place anyway. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Hildebrand v. Board of Trustees of Michigan State University*, 662 F. 2d 439 (6th Cir. 1981), *cert. denied* 456 U.S. 910 (1982); *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983).

8. The court finds that the plaintiff failed to produce probative evidence from which the court could find that his protected First Amendment activity was a substantial factor in the defendants' decisions. Even if plaintiff had met this initial burden of proof, the court finds that the defendants proved by a preponderance of the evidence that their decisions would have been made despite the plaintiff's protected First Amendment activity.

9. In our previous rulings, this court has held that even though plaintiff requested compensatory and punitive damages, the Eleventh Amendment forbids award of any such damage or legal relief against the particular defendants in this suit. Because only equitable relief is available, this court ruled that plaintiff is not entitled to a jury trial. *Hildebrand, supra; Harris v. Richards Mfg. Co., Inc.*, 675 F.2d 811 (6th Cir. 1982); *Moore v. Sun Oil Co.*, 636 F.2d 154 (6th Cir. 1980); *Lynch v. Pan American World Airways, Inc.*, 475 F. 2d 764 (5th Cir. 1973).

10. Under Fed. R. Civ. P. 50(a), a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476 (1943). Before the evidence can be submitted to the jury, there is a preliminary question for the judge whether there is sufficient evidence upon which a jury could proceed to find for the party who has the burden of proof. *Improvement Co. v. Munson*, 14 Wall 442 (1872), *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

11. The Court finds that the plaintiff has failed to produce sufficient evidence with respect to his § 1981 or First Amendment claims to submit these claims to a jury. As a result, this Court would have directed a verdict for the defendants on these issues in the event this case had been tried to a jury.

12. Plaintiff has alleged a violation of his liberty interests without due process because of Dr. Borchert's November 4, 1981 letter to Dr. Rose evaluating plaintiff's administrative skills. (Plaintiff's Exhibit 44). Whether or not the letter implicates a liberty interest is a question of law for the court. Nothing in this letter implicates the plaintiff's reputation and honor in the community sufficiently to implicate a liberty interest. Furthermore, the information is cumulative and substantiated by the record. *Roth v. Board of Regents*, 408 U.S. 564 (1972); *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986); *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976); *Kendall v. Board of Education of Memphis City*, 627 F.2d 1 (6th Cir. 1980); *Stratten v. Wadsworth Veterans Hospital*, 537 F.2d 361 (9th Cir. 1976).

13. Plaintiff presented no evidence that defendants have actively sought to discredit him to future employees, *cf.*, *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986).

The court finds that the plaintiff's contract was not renewed because of constitutionally valid reasons and that the plaintiff's liberty interests were not implicated. Therefore, no due process hearing is legally required. *Roth, supra.*

14. If a liberty interest had been implicated, plaintiff would be entitled to notice and an "opportunity to refute the charges before university officials." *Lake Michigan, supra* at 1096. Plaintiff received several opportunities to refuse the allegations of Dr. Borchert's letter. Therefore, even if a liberty interest had been violated, due process was given to the plaintiff.

15. The plaintiff is entitled by the terms of his contract to the procedures listed in the Faculty Handbook. (Defendants' Exhibit Q). The Court finds that the university complied with procedures set out in the handbook.

CONCLUSION

Other than plaintiff's deeply felt beliefs, there is no evidence before this Court to suggest that the employment decisions of which he complains were based on discrimination because of his national origin or that they were in retaliation for his letters in July and August, 1981 or the more formal grievance filed in December of that year.

ORDER

The clerk shall enter final judgment herein against the plaintiff and in favor of the defendants. The costs of this action are assessed against the plaintiff.

/s/ James I. Graham
JAMES I. GRAHAM
United States District Judge

Date: August 26, 1987

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case Number C-2-02-1356

DR. PREDIP GHOSH

v

OHIO UNIVERSITY

JUDGMENT IN A CIVIL CASE

[Filed Aug. 26, 1987]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment entered against the Plaintiff and in favor of the Defendants. The costs of this action are asserted against the Plaintiff.

KENNETH J. MURRAY
Clerk

/s/ [Illegible]
By Deputy Clerk

August 26, 1987
Date

APPENDIX D

TESTIMONY OF VATTEL T. ROSE

* * * *

[255] Q. Was there a reason you did not discuss it with him?

A. I think at that point Dr. Ghosh and I weren't discussing very much.

Q. You were not talking to Dr. Ghosh?

A. Dr. Ghosh and I were not talking. He was not talking either.

Q. Would you take that sentence as an accusation that the decision had already been made not to reappoint him?

A. I am sorry?

Q. The sentence I just read to you, does that sound to you as if he is accusing you of already deciding not to reappoint him?

A. It certainly does. I think he says that in so many words.

Q. And he put that in writing. Did you discuss that with anybody?

A. I would assume that I discussed it with the members of the appointments and tenure committee.

Q. When would you have done that?

A. Well, sometime subsequent to receiving the memorandum from Dr. Ghosh.

Q. Did you discuss with any other members of the evaluation committee Dr. Ghosh's claim that you had already made the decision not to reappoint him?

A. I would assume that I did, and I would go further and [256] say most likely I also gave each of the members of that committee a copy of this memorandum.

Q. Do you remember the substance of those discussions? Anybody ask why does he think we have already decided—

A. I can't recall specific discussions regarding that point.

Q. Can you recall generally the discussions?

A. Not even generally. It might have been brought up at the meeting that we did have.

Q. Would you consider that a serious matter, if a faculty member was accusing you of already deciding?

A. I would consider very serious.

Q. But you can't recall any discussions about the subject?

A. No, I can't.

Q. And you did not discuss it with Dr. Ghosh?

A. No, we did not discuss it.

Q. You indicated you two weren't talking. What I am trying to find out, is that just because you never saw each other or you just weren't on speaking terms?

A. There came a point where we were no longer on speaking terms.

* * * *

[259] Q. What sorts of things was he accusing you of?

A. At some point he accused me of mismanagement of the affairs of Afro-American Studies and responded in writing saying if he had evidence of mismanagement, it was his responsibility to make the authorities at the university aware of that. I said it was both his moral and legal responsibility to do that.

Q. He directly stated to you that he felt you had mismanaged—

A. Yes, he did, in a memorandum.

Q. Did that—do you think that had anything to do with the deterioration of your relationship?

A. I certainly think so.

Q. Is there anything else you can think of that might have caused your relationship to deteriorate?

A. I am not sure.

Q. Again, just so that I can be clear, this deterioration of your relationship, this nonspeaking relationship you had, had no bearing on your decision to recommend nonrenewal?

A. Absolutely not.

Q. Wouldn't such a relationship interfere with your ability to supervise Dr. Ghosh?

[260] A. I would think that it would.

Q. Wouldn't that kind of thing have some bearing on your evaluation of his value of the department?

A. I did not.

Q. Could you turn to Plaintiff's Exhibit 41? Do you recognize that?

A. Yes, I do.

Q. And what is that?

A. It is a memorandum to me from Francine Childs.

Q. Concerning Dr. Ghosh's—

A. Failure to reappoint and there is a thing about tenure.

Q. Did you ask her to write this memorandum?

A. I am not sure. I might have.

Q. Did you ever ask Dr. Stewart to find out how much termination notice you would have to give Dr. Ghosh?

A. I am not sure. I might have. I am not sure about that.

Q. Did he ever inform you of how much termination notice you had to give Dr. Ghosh?

A. I would assume that he did if I asked.

Q. I am having a hard time hearing you.

A. I would assume that he did provide that information if I asked for it.

* * * *

TESTIMONY OF CALVIN THAYER

* * * *

[201] Q. Are you aware if Dr. Ghosh ever had a hearing concerning this matter?

A. A hearing with the promotion and tenure committee?

Q. Yes?

A. Oh, yes.

Q. Could you describe that hearing?

A. Well, the usual procedure is the one we followed here, that we scheduled a meeting with Professor Ghosh and all of the members of the committee were present, and he made his statement and various members of the committee asked questions about the documents he had presented to us and about the whole general situation.

Q. Can you recall how many committee members were present?

A. I think the whole committee was there. There are eight of us all together.

Q. Were any other witnesses brought in?

A. Oh, yes, we talked to Dean Porter, we talked to Professor Rose, we talked to Dean Borchett, we talked to Dean Dorrill at different times.

Q. At different times?

A. Yes.

Q. Did you do that in the presence of Dr. Ghosh?

A. No.

[202] Q. Did you give Dr. Ghosh the opportunity to ask questions of those witnesses?

A. Now, that is not within the prerogative of our committee. We could not do that.

Q. So could you describe for me just how this hearing progressed? You indicated that you talked to Porter and Rose and others at different times. I am trying to get a feel for how the procedure worked.

A. Well, what happens is that we arrange meetings with each of these people, these are people involved in

any of these cases, and ask them for their account of what had happened. Now, about specific questions, this was six years ago, and specific questions, we do not keep records. Under any chairmanship, it was never kept, documents, so that I can't give you a list of questions that were asked, but they had to do with the original appointment and what the expectations were for this institute that seems to have been such an important issue, although it did not really concern my particular committee.

Q. After you talked to Rose and Porter and others and got various information from them, did you give Dr. Ghosh an opportunity to respond to what they had told you?

A. Dr. Ghosh—I am trying to remember—I am trying to remember the order in which all of this occurred, the [203] order in which we talked to people. I don't think there was that kind of opportunity at the end. We had heard about that at some length a little earlier, but my recollection is that our last interview was with Dean Dorrill, and then the committee met privately all along a number of times after each of the conferences, so the committee itself was involved, I would suppose, say maybe 12 to 15 meetings all together.

Q. Did you ever construct a list of reasons for the actions taken against Dr. Ghosh?

A. I beg your pardon?

Q. Did you ever construct a list of reasons for the actions taken against Dr. Ghosh to justify the actions taken against him?

A. No, we did not. The terms under which the promotion and tenure commitee acts were extremely circumscribed. We are limited by the faculty handbook to consider questions of academic freedom, adequate or inadequate consideration, due process, and what we are required to do is to determine whether any of these three have been violated. This was a standing committee. It was not a committee of attorneys. It is a stand-

ing committee of faculty members from a wide variety of departments ranging from history to home economics. There are things we can do and things we can't do.

[204] Q. Now, referring again to Joint Exhibit No. 9 which you still have in front of you, you indicated that you had been asked to come up with a more amplified version of your previous document; is that correct?

A. That is correct.

Q. Who asked you to do that?

A. Mr. Burns.

Q. Mr. Burns?

A. John Burns.

Q. And did he give you a reason why?

A. My recollection is he said he thought it would be helpful simply to have a fuller statement than we usually have in these matters, I assume because of the complexity of certain aspects of the grievance.

Q. Now, would you agree that this statement doesn't discuss any of the facts concerning Dr. Ghosh's grievance?

A. I would agree that it does not consider the legal questions that have arisen.

Q. Would you agree that the addition that you have made to the finding basically is to enumerate the three areas of responsibility of the committee?

A. Exactly.

Q. But do you feel that there is anything in here that discusses the reasons for your rulings on those three areas?

[205] A. No, that is not here. I couldn't find—it is not here, no.

Q. Can you recall the reasons for your ruling?

A. Yes. The reason for the ruling emerges from the standard definitions of academic freedom and adequate consideration, and what we understand about due process, and since academic freedom involves the faculty member's right to speak his mind on issues that he con-

siders important without fear of reprisal for distasteful political views or something like that, this seemed clearly not involved. A matter of inadequate consideration seemed to us clearly not to be involved because of the enormous number of documents involved before the letter of termination that Professor Rose wrote in November of 1981 is a massive amount of consideration. Due process—our understanding has always been due process means following the procedures outlined in the faculty handbook in cases of non-reappointment, denial of tenure, passing over for promotion, and that sort of thing.

Q. When you refer to massive amount of documents, are you referring to the documents generated by Dr. Ghosh?

A. Yes.

MR. CONLEY: I have no further questions.

* * * *

[211] Q. Did the committee ever recommend that a hearing be held in any case that you are aware of?

A. No.

Q. So you are not aware of any hearings ever being held?

A. No, the only hearing of that sort that I have ever heard of in the 21 years I have been with the Ohio University have been in cases where someone is detenured, tenured faculty members under threat of dismissal.

Q. And is it your testimony that the committee would have—would only have recommended such a hearing if they were either deeply divided within themselves or they had actually found a violation of a person's right?

A. Actually found a violation and there had been no resolution of the problem. We often find violations and there is usually a resolution. Either the faculty member or the administration makes a concession and that is how it is.

* * * *

TESTIMONY OF JAMES L. BRUNING

[227] Q. You made some reference to possibility of him having a hearing if he had requested one?

A. No.

Q. That is what I am not clear about?

A. I am sorry, I said that had he wished, according to the process, he could go back at any time to the departmental committee that originally had not recommended him for reappointment. That is part of the process itself. In terms of the faculty senate, promotion and tenure committee, there was no hearing to be held. They did not recommend one be held. Had they recommended, then a hearing would have been held.

Q. And that is the only way that a hearing could have been held, is if they would have recommended one?

A. That is correct.

* * * *

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1313

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DR. PRADIP GHOSH,
Petitioner,
v.
OHIO UNIVERSITY, DR. CHARLES PING, DR. JAMES BRUNING, and BOARD OF TRUSTEES OF OHIO UNIVERSITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

WHETHER THE FIRST AMENDMENT REQUIRES A STATE UNIVERSITY TO RETAIN AN UNPRODUCTIVE TEACHER INDIFFERENT TO HIS DEPARTMENT'S OBJECTIVES SIMPLY BECAUSE, IN THE CONTEXT OF AN EMPLOYMENT DISPUTE, HE WROTE A LETTER TO HIS DEPARTMENT CHAIRMAN REGARDING HIS MERIT PAY RAISE.

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DR. PRADIP GHOSH,
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OHIO UNIVERSITY, DR. CHARLES PING, DR. JAMES BRUNING, AND BOARD OF TRUSTEES OF OHIO UNIVERSITY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Ohio University hired Pradip K. Ghosh as an associate professor of Afro-American Studies to teach and develop Afro-American Studies courses in urban and rural development, and to form and seek funding for an Institute for Urban and Rural Development. Ghosh wrote and

submitted a grant proposal to the National Science Foundation. The National Science Foundation denied funding of the proposal, and severely criticized its content.

When Ghosh was hired, the Center for Afro-American Studies was an independent academic unit with its own dean. On 1 July 1980, however, the Center merged into the College of Arts and Sciences, and Ghosh's dissatisfaction began.

The Institute for Urban and Rural Development, which he was struggling to create, was folded into a second institute-in-formation, which was begun in 1976 by Mark Weinberg. Weinberg's institute succeeded where Ghosh failed: it obtained grants and completed projects within its narrow focus on local government and rural development, a focus

both unique in Ohio and consistent with the rural setting of Ohio University. Ghosh was invited to participate in Weinberg's institute, but his interests became increasingly international, and he lost interest.

Ghosh proved to be an unproductive teacher.[1] He never successfully developed new courses. Other Afro-American faculty members hoped he would retrain himself to teach Afro-American Studies courses, as they had, but Ghosh said he would never teach traditional

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[1] Ghosh's claim that "he taught more credit hours than other members of the Department," is misleading. Petition for Writ of Certiorari, at 4. Ghosh taught few students, but more "weighted student credit hours," which are weighted in favor of graduate-level courses. Afro-American Studies is an undergraduate major, and offers no graduate degree, so the number of undergraduate students taught is deemed a more important measure of productivity than weighted student credit hours.

Afro-American Studies courses.

As Ghosh's academic interests and the institutional needs of Afro-American Studies diverged, Ghosh became acutely dissatisfied. Two incidents angered him.

First, Ghosh thought he should be paid to oversee a graduate-level independent research course in summer school. At Ohio University, the dean of each college has limited funds to run a summer program, and must cancel courses with low enrollment of tuition-paying students. In the discretion of a dean, however, a course with low enrollments may be taught when it is central to the mission of the department in which it is offered.

Ghosh's independent research course had low enrollments, and most of the students who enrolled were on "tuition waivers." The course escaped

cancellation only because Ghosh offered to teach it without pay.

Ghosh learned that a colleague was paid to teach an underenrolled undergraduate course in Afro-American Studies. The undergraduate course, History of Injustice in the United States, was central to the Afro-American Studies program, which offers no graduate degree.

Ghosh demanded to be paid. He sent a series of angry letters. Ghosh's department chairman, Vattel Rose, the dean's office, and the provost's office agreed that the correct decisions had been made.

Second, Ghosh became angry about his merit rating. Merit ratings are the basis for additional faculty compensation to reward meritorious teaching, research and service. Chairman Rose originally

gave Ghosh a merit rating of 6 on a scale of 10. The Dean of Arts and Sciences, William Dorrill, met with Chairman Rose to discuss the merit ratings of three Afro-American Studies professors. Rose changed all three merit ratings after the meeting. Ghosh's rating was reduced by one point. When Ghosh learned of the reduction, he sent a blistering three-page letter to Chairman Rose. In one line, he complained of perceived mismanagement of Afro-American Studies resources.

Ghosh stopped speaking to Chairman Rose. Rose testified that twice he spoke to Ghosh, who glared back and said nothing. Rose said he could have continued as Ghosh's colleague if Ghosh had shown a commitment to teaching, research and service within the focus of Afro-American Studies.

Ghosh requested and received a meeting with Dean Dorrill. Ghosh claims that Dorrill threatened to terminate him if he filed a formal grievance. However, Dean Dorrill and Associate Dean Donald Borchert testified that Dorrill told Ghosh his future was entirely up to him, but that the University could not afford to pay employees who do not teach. Indeed, Dorrill noted that Ghosh taught fewer students than any faculty member in the College of Arts and Sciences, and concluded that Ghosh would have to adapt and teach Afro-American Studies courses, find another department at the University in which to teach, teach at a University branch, or, failing all else, find a job elsewhere. The Dean told Ghosh he must remedy his low enrollments, or his contract would be terminated. Ghosh conceded at least twice during the

meeting that the University's position was not unfair.

Dean Dorrill testified that he did not threaten to fire Ghosh if Ghosh filed a grievance. Instead, he gave "friendly counsel." Whether or not he stayed at the University, Ghosh would need the cooperation of his colleagues, who would not be eager to help him if he continually complained abrasively. Associate Dean Borchert reaffirmed this advice in a later meeting with Ghosh.

Each year, faculty members are evaluated for reappointment. The Afro-American Studies Committee on Promotion and Tenure evaluated Ghosh in the fall of 1981. Ghosh was invited to submit materials and to attend a meeting of the committee, which was comprised of his colleagues, all of whom are Black. Ghosh produced a few materials after delay, and

sent the committee a memorandum in which he stated he did not intend to teach traditional Afro-American Studies courses.

The committee met. Although invited to do so, Ghosh did not attend. The committee considered the materials Ghosh had submitted, his teaching record, his stated unwillingness to teach Afro-American Studies courses, his failure to form an institute, and his poor performance in Dr. Weinberg's institute. Although it recognized that Ghosh's position would likely remain unfilled, the committee voted to give Ghosh a terminal contract and to recommend his nonreappointment. In a letter to Ghosh, Chairman Rose explained the reasons for the committee's decision: Ghosh's stated unwillingness to teach Afro-American Studies courses, his low productivity as

a teacher, and his lack of collegiality and cooperation with his colleagues.

As a probationary faculty member, Ghosh filed a formal grievance under Ohio University's faculty handbook. The grievance included a copy of Ghosh's letter to Rose. Ghosh's department chair, the Dean of Arts and Sciences, the Provost, and the Standing Committee on Promotion and Tenure of the Faculty Senate, reviewed his bulky grievance, and found it to be without merit. The Standing Committee on Promotion and Tenure met with Ghosh, interviewed numerous witnesses, met between twelve and fifteen times, and spent eighteen to twenty hours considering the grievance, but still concluded the grievance was without merit.

Although Ghosh, at that point, had exhausted his remedies under the faculty

handbook, he got another bite at the apple. He sent a letter to the Provost, with several pages of argument. Although he was not required to do so, the Provost considered the materials, but still found no merit to Ghosh's grievance.

Ghosh completed his terminal contract on 24 November 1982, after he had received the procedures described above.

Ghosh filed suit in the United States District Court for the Southern District of Ohio. He claimed that the University discriminated against him based upon his national origin (Indian), non-renewed his teaching contract to retaliate for his exercising first amendment rights, and denied him due process to respond to an unfavorable letter written during his department's reappointment evaluation.

In a trial to the bench, Ohio University[2] prevailed on all issues. The United States Court of Appeals for the Sixth Circuit affirmed. Ghosh seeks a writ of certiorari to the Sixth Circuit.

SUMMARY OF ARGUMENT

Ghosh claims that his colleagues recommended his nonreappointment to retaliate for a letter Ghosh wrote to his department chairman. His nonreappointment, he argues, abridged his free speech rights as a public employee.

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[2] Ghosh originally filed this action against Ohio University directly. The district court held that the eleventh amendment barred all actions against the University, and dismissed it as a party. The court permitted Ghosh to seek equitable relief against the University by filing a fifth amended complaint naming Dr. Charles Ping, President of Ohio University, Dr. James Bruning, Provost of Ohio University, and the Ohio University Board of Trustees, as defendants. For simplicity, the respondents will be referred to collectively as "Ohio University."

The Sixth Circuit applied the correct analysis, and applied it correctly. The court concluded from the letter's content and context that it involved matters of private concern arising from an employment dispute. Thus, this case presents no momentous constitutional question for review.

Moreover, review would be futile. The district judge, after hearing three days of testimony, found that Ghosh's letter was not a substantial or motivating factor in the University's nonreappointment decision. Ghosh does not challenge that finding, which is entitled to great deference. Thus, even if the Sixth Circuit held incorrectly that Ghosh's letter involved private concerns, the University still must prevail. Review should be reserved for another case, one in which protected

speech substantially caused a public employee's nonreappointment.

ARGUMENT

I. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

A. The Sixth Circuit Applied The Correct Analysis.

Originally, Ghosh alleged racial discrimination, denial of due process, and denial of his first amendment right to free speech. His petition for a writ of certiorari has narrowed the issue to whether the University violated his first amendment rights.

In a series of cases beginning with Pickering v. Board of Education, 391 U.S. 563 (1968), this Court has defined the analysis courts must apply to determine whether a public employee lost his job because of an impermissible infringement on his first amendment right to free speech. The Sixth Circuit correctly

identified the Pickering analysis:

> First, the employee must demonstrate that his conduct was protected. Second, the employee must demonstrate that the protected conduct was a substantial or motivating factor in the decision to dismiss. Finally, the employer may show that the dismissal would have occurred even in the absence of the protected conduct.

Ghosh v. Ohio University, Nos. 87-3899/4115, slip op. at 6a (6th Cir. Nov. 8, 1988).

The Sixth Circuit, applying the refinements of Connick v. Myers, 461 U.S. 138 (1983), correctly recognized that the first part of the analysis

> involves two subordinate inquiries of law: (1) whether the conduct involved a "matter of public concern," and (2) whether the employee's right of communication outweighed the efficient operation of the public employer.

Ghosh v. Ohio University, slip op. at 7a.

The court applied the analysis of Pickering and its progeny, and determined from the context, content, and

form of Ghosh's grievance that it concerned only matters of private concern.[3]

B. The Court Applied The Analysis Correctly.

Not only did the Sixth Circuit apply the correct analysis, it applied the analysis correctly. Ghosh's grievance

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[3] The district court had held that Ghosh's grievance warranted first amendment protection because it was akin to filing a lawsuit. Ghosh v. Ping, No. C-2-82-1356, slip op. at 14 (S.D. Ohio Aug. 26, 1987). The Sixth Circuit correctly decided that the district court had applied the wrong analysis, and instead applied the Pickering analysis. Ghosh, in his petition for a writ of certiorari, claims that this Court held in Cruz v. Beto, 405 U.S. 319 (1972), that grievances are akin to lawsuits. Petition at 6. However, Ghosh misstates the facts and holding of Cruz, in which a prisoner actually filed a lawsuit for alleged violations of his right to the free exercise of religion, and in which the Court recognized his right to petition the government through the courts. Likewise, Ghosh misrepresents the holding Inada v. Sullivan, 523 F.2d 485 (7th Cir. 1975), in which the plaintiff also filed suit.

did not involve matters of public concern. Even if the grievance did involve matters of public concern, Ghosh's interest in expressing his views was outweighed by Afro-American Studies's interest in employing only faculty committed to teaching, research, and service within the department's focus.

The specific grievance was a letter Ghosh sent to his chairman, Vattel Rose, on 24 July 1981. The letter followed Ghosh's disappointment at having his merit rating reduced from a 6 to a 5. The letter catalogued the reasons why Ghosh thought he should have received the original rating of 6. Only one sentence dealt with any other topic. In it, Ghosh wrote, "I do not agree with your attitude toward me, nor do I agree with the way the Afro-American Studies Department is run leading to mis-management of

departmental academic program in order to help worthless non-academic causes." Nowhere in that letter did any of the language appear that Ghosh now includes in his statement of facts, purportedly complaining that Rose mismanaged department funds by paying for concerts, books, tape recordings, and travel. Petition at 3. All of this language was included in a memorandum to Dr. Rose dated 19 November 1981, THE DAY AFTER GHOSH WAS NOTIFIED OF HIS NONREAPPOINTMENT. In short, none of the language Ghosh quotes could possibly have been considered in the decision not to reappoint him. The decision had been made before Ghosh wrote his memorandum.

Ghosh wrote the 24 July 1981 letter in the context of a private employment

dispute with his chairman. The content addressed that private dispute. Thus, the content and context of Ghosh's 24 July 1981 letter suggest that the letter involved matters of private, not public, concern. Therefore, the Sixth Circuit correctly applied the Pickering analysis.

II. REVIEW WOULD BE FRUITLESS BECAUSE GHOSH'S "GRIEVANCE" WAS NOT A SUBSTANTIAL FACTOR IN HIS NONREAPPOINTMENT.

Ghosh is asking this Court to review the Sixth Circuit's decision. Presumably, if review is granted, Ghosh will ask this Court either to enter judgment for him or to remand the case for a further hearing. Either would be futile.

Even if Ghosh's grievance involved a matter of public concern that outweighed the University's institutional interests, Ghosh still cannot prevail. At trial,

Ghosh was required to prove that the grievance was a "substantial or motivating factor" in the decision not to reappoint him. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 416 (1979); Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977).

The district judge heard three days of testimony. In its written Findings of Fact and Conclusions of Law, the court determined that Ghosh "failed to produce probative evidence from which the court could find that his protected First Amendment activity was a substantial factor the in defendants' decisions." Ghosh v. Ping, No. C-2-82-1356, slip op. at 22a (Aug. 26, 1987). The court was so thoroughly convinced that Ghosh failed to produce sufficient probative evidence that it wrote that "this Court would have

directed a verdict for the defendants on the [first amendment issue] in the event this case had been tried to a jury." Id. at 23a.

On review, the trial judge's findings of fact may not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a). Indeed, this Court gives great deference to the trial judge, who is experienced in the role of fact finder, especially when, as in this case, the findings depend on weighing the credibility of witnesses. Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

In this case, the trial judge heard testimony, weighed the credibility of the witnesses, and decided that Ghosh had

presented no probative evidence to support his contention that his nonrenewal resulted from his grievance. In his petition, Ghosh has not challenged that finding. Therefore, to accept this case would be a futile exercise. Even if the Court were to hold that the Sixth Circuit misapplied the first step of Pickering analysis, Ohio University must still prevail because Ghosh was unable at trial to satisfy the second step of the analysis.

CONCLUSION

This court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 87-3899/4115

DR. PRADIP GHOSH,
Plaintiff-Appellant (3899)
Plaintiff-Appellee (4115),

v.

OHIO UNIVERSITY, DR. CHARLES PING, DR. JAMES BRUNING, and BOARD OF TRUSTEES OF OHIO UNIVERSITY,
Defendants-Appellees (3899).
Defendants-Appellants (4115)

On Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed Nov. 8, 1988

Before: WELLFORD and BOGGS, Circuit Judges; and BROWN, Senior Circuit Judges.

PER CURIAM. This is an action for equitable relief under 42 U.S.C. §§ 1981 and 1983. Plaintiff-appellant, Pradip K. Ghosh ("Ghosh"), sought reinstatement to his position as a nontenured professor of Afro-American Studies at Ohio University. Ghosh claimed that Ohio University discriminated against him based on his national origin (Indian), refused to renew his teaching

contract in retaliation for exercising his first amendment rights, and denied him due process of law by refusing to allow him to respond to an unfavorable letter written during the process of his department's reappointment evaluation.

After the district court held in favor of Ohio University on all issues, Ghosh appealed on his first amendment and due process claims, but did not pursue further the decision denying his national origin claim. Ohio University also sought to recover attorneys' fees under 42 U.S.C. § 1988. The request was denied and Ohio University cross-appealed.

For the reasons stated below, we affirm the decision of the district court.

I. BACKGROUND

Ghosh, a native of India, has resided in the United States for over twenty years and holds a Ph.D. in Sociology and Social Engineering from the University of New York at Buffalo. In June 1979, while teaching at Southern University in Louisiana, Ghosh responded to an ad in the *Chronicle of Higher Education* announcing the availability of a position as "assistant/associate professor of Urban and/or Rural Development." This ad was placed by the Center for Afro-American Studies at Ohio University, which held the status of a separate college at the time. Ghosh was hired to fill this position, with the understanding that one of his responsibilities would be to establish an Institute for Urban and Rural Studies to help boost enrollment. Before arriving at Ohio University, Ghosh unsuccessfully sought a grant from the National Science Foundation to help fund the proposed Institute.

Ghosh arrived at Ohio University in January 1980. Due to low enrollment and the resignation of its dean, the Center for Afro-American Studies was merged into

the College of Arts and Sciences on July 1, 1980. Interest in developing an Institute for Urban and Rural Studies faded, and the effort was "combined" with an existing effort to develop an institute focusing solely on rural affairs. This rural "institute-in-formation" was begun in 1976 by Mark Weinberg, who had successfully obtained grants and other outside funding for this program. Although Ghosh was invited to join the steering committee and to help establish the rural studies institute, his participation with the steering committee was minimal. Ghosh was upset when Weinberg, a white whom Ghosh felt was less qualified than he, was formally selected by the University to coordinate the institute in September of 1980. Ghosh complained to the Dean about Weinberg's selection, but to no avail.

In 1980, Dr. Rose, the head of Ghosh's department, gave Ghosh a favorable performance evaluation. By 1981, however, the relationship between Ghosh and the University had begun to deteriorate. Ghosh had, in the interim, complained about a graduate summer school course that he was scheduled to teach which was cancelled due to insufficient enrollment. Ghosh agreed to teach the course without pay, a not uncommon situation among professors teaching summer school. Ghosh also had become upset when he discovered that another professor, who was teaching an undergraduate course which had been cancelled due to lack of enrollment and then rescheduled, was being paid for her efforts even though she was teaching fewer students than he was teaching. In August 1981, Ghosh sent a series of letters to the administration demanding that he be paid. The University explained that the decision to pay certain professors to teach classes that initially had been cancelled due to lack of enrollment was based on whether the course was essential to a certain major. The Dean's office decided that the undergraduate course was a core course but that Ghosh's graduate course was not a core course.

Also in 1981, Ghosh's merit rating was lowered from a six to a five (on a ten-point scale). Dr. Rose initially gave Ghosh a score of six. When Dean Dorrill received Rose's evaluation he felt that Rose had overevaluated Ghosh and requested him to reconsider the recommendation.[1] Rose lowered Ghosh's evaluation. The lowered evaluation resulted in the reduction of Ghosh's salary for the upcoming teaching year.

On July 24, 1981, Ghosh wrote a letter to Dr. Rose complaining about the reduction of his faculty evaluation rating and on the same date, he wrote to Associate Dean Borchert objecting to the cancellation of his summer course and requesting payment for his teaching effort. Ghosh characterized these letters as grievances. Because Ghosh was not satisfied with the responses he received to either letter, he brought these matters to the attention of Dean Dorrill in a meeting held in August of 1981. In August, he also wrote to Acting Provost, James Bruning, regarding the nonpayment of summer teaching. In that letter, Ghosh claims that Dean Dorrill threatened him with termination for filing these grievances and further alleges that the nonrenewal of his teaching contract was in retaliation for filing these grievances.

On November 14, 1981, Ghosh was notified that his teaching contract would not be renewed beyond November of 1982. This decision was based upon the results of a standard evaluation procedure wherein a committee consisting of the chairman and two tenured faculty members of the Center for Afro-American Studies evaluated Ghosh's performance. Ghosh was invited to appear before the committee, but he declined to do so. After reviewing Ghosh's performance, the committee recommended nonrenewal. This recommendation was based upon lack of student enrollment in Ghosh's courses,

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[1] Rose also was asked to re-evaluate the ratings he gave to two other professors.

Ghosh's failure to develop courses appropriate to the curriculum of Afro-American Studies, and his lack of interest in re-orienting his efforts toward Afro-American Studies.

The department of Afro-American Studies also requested the Dean's office to evaluate Ghosh's administrative performance. This task was assigned to Associate Dean Borchert, who then proceeded to investigate Ghosh's performance with various deans, department chairmen, and faculty members who had worked with Ghosh. Borchert also reviewed Ghosh's personnel file. On August 4, 1981, Dean Borchert reported that Ghosh had "failed entirely to demonstrate the qualities of leadership skill necessary."

On December 4, 1981, Ghosh submitted a formal grievance to Dean Dorrill wherein he outlined his version of the various events which had occurred during his employment at Ohio University. Ghosh's grievance was treated as a nonreappointment grievance under section II(D)(6) of the Ohio University faculty handbook. Dean Dorrill responded in detail to each of the allegations contained in Ghosh's grievance and concluded:

> Having assessed very carefully your submitted materials relative to your non-reappointment grievance, I am led to the conclusion that your claims of broken commitments and conspiracy are without foundation in fact, and that your grievance merits no redress.

After receiving Dean Dorrill's response to his grievance, Ghosh appealed the matter to the University Provost, Dr. James Bruning, who asked Associate Provost, Dr. David Stewart, to assist him in reviewing Ghosh's grievance and the Dean's response. Dr. Stewart reviewed and analyzed both documents and recommended that the Dean's decision be sustained. The Provost concluded that there were no grounds for the grievance, and

informed Ghosh that he concurred with Dean Dorrill's response to his grievance.

Ghosh then appealed his grievance to the faculty senate. The appeal was referred to Dr. Calvin Thayer, Chairman of the Promotion and Tenure Committee. Dr. Thayer's committee investigated Ghosh's grievance to determine whether or not there had been a violation of academic freedom, a failure to adequately consider his complaints, or a violation of due process as claimed by Ghosh. A meeting was scheduled with Ghosh, and all eight members attended and asked questions. The committee conducted its own investigation and personally interviewed Dean Porter, Professor Rose, Dean Borchert, Dean Dorrill, and others. The committee issued its report to the chairman of the faculty senate finding unanimously that Ghosh's substantive rights under the faculty handbook had been violated. The district court found that Ghosh's grievance was handled in accordance with the Ohio University faculty handbook procedures.

II. FREEDOM OF SPEECH

The first issue considered was whether the nonrenewal of Ghosh's contract was an act of retaliation infringing on his first amendment rights. When a public employee claims that his dismissal deprived him of a constitutional liberty interest without due process, the reviewing court must engage in a multistage analysis. First, the employee must demonstrate that his conduct was protected. Second, the employee must demonstrate that the protected conduct was a substantial or motivating factor in the decision to dismiss. Finally, the employer may show that the dismissal would have occurred even in the absence of the protected conduct. *See Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216, 219 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court established a qualified pro-

tection for the speech of public school teachers. *Pickering* mandated a balancing test to determine when a public school teacher may communicate in public without fear of retaliation by the state. The test recognizes that a state "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Although the Court did not furnish absolute guidelines, it indicated that the employee's interest in expression must be weighed against the employer's expectations of "promoting the efficiency of the public services it performs through its employees." *Id.*

In 1983, the speech protection afforded public employees was narrowed significantly by *Connick v. Myers*, 461 U.S. 138 (1983). As articulated in *Pickering*, the employee must show that his activity was protected. Under *Connick*, this initial issue involves two subordinate inquiries of law: (1) whether the conduct involved a "matter of public concern," and (2) whether the employee's right of communication outweighed the efficient operation of the public employer.

Connick concluded that the "public concern" factor was paramount in the balancing test. Federal courts should review a personnel decision of a public employee only when it involves the employee's speech about matters of *public* concern. *Id.* at 147-48. Absent an issue of public concern, courts need not address the remaining balancing considerations, and *Pickering* protection does not apply. *Id.* Unfortunately, the Court failed to set forth a clear standard for identifying a matter of "public concern"; each such determination must be made on an *ad hoc* basis.

Given the facts in *Connick*,[2] the Court concluded that the "government's interest in the effective and efficient

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[2] The plaintiff in *Connick* was an assistant district attorney in New Orleans. Because she objected to a transfer to a different

fulfillment of its responsibilities to the public" outweighed the plaintiff's first amendment protection. Even though the plaintiff's speech was constitutionally protected, she was a public employee speaking "not as a citizen" and on matters "only of personal interest." *Id.* at 150-54.

> *Connick* broadens the restriction upon a public employee's communication particularly when criticizing aspects of employment. Generally, courts will not protect commentary respecting internal policies —work-site criticism. The Court's narrow scope of protected speech appears to "give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation. . . ." The majority in *Connick* "reacted to what it perceived to be a vertiable flood of personnel disputes that diverted an inordinate quantity of judicial resources."

Matheson, *A Peacock's Tale: Due Process and Free Speech in Academe*, 1986 Ariz. St. L.J. 401, 438-39 (footnotes omitted).

The Court in *Connick* provided little guidance in determining whether an issue is one of public or private concern. According to the Court, whether a particular communication addresses a matter of public concern is determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Because this inquiry constitutes a question of law, the reviewing court must independently evaluate an employee's speech in each case.

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sector of the criminal court, she prepared a questionnaire and distributed it to her office collegaues. The questionnaire sought reactions to the office transfer policy, office morale, lack of confidence in supervisors, the need for a grievance committee, and possible pressure to work in political campaigns. Her supervisors immediately fired her when they learned of the questionnaire.

Although the courts have experienced difficulty in applying the *Connick*, some agreement is developing. Courts tend to identify internal employment squabbles involving salary, course assignments, and teaching evaluations as matters of only private interest or as extensions of purely private disputes. *See, e.g., Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984); *Ballard v. Blount*, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir. 1984). On the other hand, speech related to exposing waste, ineptitude, breach of public trust, or danger to the public in government, *see Connick*, 461 U.S. at 146-49; electorate issues to inform public date, *see Pickering*, 391 U.S. at 568-72; and academic standards, *see Johnson v. Lincoln University*, 776 F.2d 443, 452 (3d Cir. 1985), are matters of public concern.

The district court erroneously held that Ghosh's grievances warranted first amendment protection because they were akin to filing a lawsuit. *Ghosh v. Ping*, No. C-2-82-1356, slip op. at 14 (S.D. Ohio Aug. 26, 1987). The court should have focused on whether Ghosh's speech concerned a matter of public or private concern. *Connick v. Myers*, 461 U.S. 138 (1983). Ghosh's grievances were private: the controversy was in the setting of a private dispute, disruption in the Afro-American Studies Department was threatened, and there was a negative impact on a close working relationship (Ghosh and his department head were not on speaking terms after the events described above). Ghosh's grievances, moreover, concerned a teaching evaluation and a tenure/nonrenewal decision. Other courts have classified these matters as private concerns. *See Renfroe*, 722 F.2d at 715; *Ballard*, 581 F. Supp. at 164-65. Ghosh's grievances did not address any matter of public concern.

III. LIBERTY INTEREST

The second issue addressed was whether Ghosh's liberty interest was violated. In *Board of Regents v. Roth*, 406

U.S. 564, 573-74 (1972), the Supreme Court stated that a person is deprived of a liberty interest when his reputation is stigmatized or when actions are taken that foreclose his opportunity to secure other employment. Later rulings, however, indicate that the Court has narrowed the scope of the liberty interest in procedural due process settings. For example, an assault upon another's reputation, without a more tangible alteration of legal status, such as the accompanying loss of employment, may not be sufficient to trigger constitutional protection. *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *see also Codd v. Velger*, 429 U.S. 624 (1977) (holding that an employee has a right to a hearing only if the employer proceeds on the basis of substantially false allegations).

Wells v. Doland, 711 F.2d 670 (5th Cir. 1983), provides an example of a liberty interest in reputation. Professor Wells sued the president of the university that refused him tenure and terminated his employment. Wells alleged that the reasons given for his termination attacked "his good name, reputation, and integrity so as to possibly deprive him of future state employment [and] caus[ed] damage to his professional reputation." *Id.* at 673. In reversing the district court's summary judgment for Wells' employer on the liberty issue, the Fifth Circuit held that Wells was entitled to an opportunity to prove certain elements of impairment: (1) That he was stigmatized; (2) that the stigma was part of the discharge process; (3) that the charges were made public; and (4) that he was denied a meaningful hearing to clear his name. *Id.* at 676. On remand, the district court was required to order the university to provide Wells with a hearing to clear his name, if these four elements of liberty impairment were established.

Assuming that the employee can demonstrate a liberty deprivation, he further must demonstrate that the deprivation occurred without due process of law. First, the employee is entitled to some type of predetermination hearing. *Cleveland Board of Education v. Loudermill*,

470 U.S. 532 (1985).[3] Although this hearing need not definitely resolve the propriety of the dismissal, it should permit a "determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46. It must include oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story. *Id.*

Ghosh claimed that the letter written by Dean Borchert implicates a liberty interest. We disagree because the letter did not tend to stigmatize his reputation or foreclose opportunity to secure other employment. Although Ghosh experienced difficulty locating other employment, this was attributable to existing market conditions rather than the letter. Ghosh never demonstrated, moreover, that the letter was publicized or shown to anyone outside the University.

It is doubtful that a liberty interest was involved, but if we assume that it was, Ghosh still received sufficient due process. At every stage of the administrative review, Ghosh was given notice and an opportunity to present his side of the story.

IV. ATTORNEYS' FEES

Ohio University contends that it is entitled to attorneys' fees under 42 U.S.C. § 1988 "upon a finding that [Ghosh's] action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). We conclude that plaintiffs' claims were not frivolous. Thus, the district court's refusal to award fees to Ohio University is AFFIRMED.

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[3] Although *Loudermill* involved deprivation of a property interest, the same analysis should apply to deprivation of a liberty interest.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-72-1356
JUDGE GRAHAM

DR. PRADIP K. GHOSH,
Plaintiff,

VS.

DR. CHARLES PING, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for equitable relief under 42 U.S.C. §§ 1981 and 1983. Trial to the court commenced on August 6, 1987 and concluded on August 8, 1987.

Plaintiff, is a native of India who was employed as an associate professor at Ohio University from January 1, 1980 to November 24, 1982. The defendants in this case are Charles Ping, President of Ohio University; James Burning, Provost of Ohio University, and the Board of Trustees of Ohio University.

Plaintiff claims that the defendants discriminated against him on the basis of his national origin by (1) hiring a white male as director of the Institute for Local Government Administration and Rural Development, (2) by lowering his merit rating, (3) by refusing to pay him for teaching a course during the summer session of 1981 and (4) by non-renewing his teaching contract and terminating his employment. Plaintiff further claims

that the defendants abridged a liberty interest without due process of law by denying him a hearing with regard to a letter written by the associate dean of the College of Arts and Sciences which was critical of plaintiff's administrative abilities. Finally, plaintiff claims that the non-renewal of his teaching contract was an act of retaliation by the defendants for his actions in filing grievances against the chairman of his department and the associate dean of the College of Arts and Sciences and that in so doing defendants violated his First Amendment rights.

FINDINGS OF FACT

1. Pradip Ghosh is a native of India. He has been a resident of the United States for 20 years and he has a Ph.D. in Sociology and Social Engineering from the University of New York at Buffalo.

2. In June of 1979, plaintiff responded to an ad in the *Chronicle of Higher Education*, which announced the availability of a position as "assistant/associate professor of Urban and/or Rural Development." This advertisement was placed by the Center for Afro-American Studies of the Ohio University which then held the status of a separate college of the university. At this time, the Center for Afro-American Studies was experiencing low enrollment and was seeking to broaden its areas of interest and expertise. As part of this project, its dean, Thomas J. Porter, desired to establish an Institute for Urban and Rural Studies. Plaintiff was selected for the advertised position with the understanding that one of his responsibilities would be to establish such an institute.

3. Upon plaintiff's arrival at Ohio University in January, 1980, he was immediately met with a changed situation. Dean Porter was resigning his deanship and instead of expanding its role, the Center for Afro-American Studies was in the process of being merged into the College of Arts and Sciences as a department

of that college, thus losing its status as an independent college of the university. This transition occurred on July 1, 1980. At that point the department no longer had a mandate or an interest in developing an Urban and Rural Development Program. The funds and responsibility for such a program had been transferred to William Dorrill, Dean of the College of Arts and Sciences.

4. In 1976, the university hired Mark Weinberg as an associate professor in the Department of Government which is now the Department of Political Science. One of his responsibilities was to help establish an institute of local government which was to be molded after a similar one that he was familiar with at the University of North Carolina. He began work on this project soon after assuming his duties at the university and he involved other faculty members in the project. Work on this project continued on an *ad hoc* basis with members of various departments. The work of these faculty members became more focused under the leadership of Dean Dorrill of the College of Arts and Sciences who had arrived on the campus in 1977.

5. When the Center for Afro-American Studies was transferred into the College of Arts and Sciences, plaintiff expected to continue to pursue the development of his Institute for Rural and Urban Development and he expected to be the coordinator of this project and ultimately the director of the institute. There were similarities between his project and the Weinberg project and when he discovered that Dean Dorrill had been meeting with a committee which was discussing the formation of an institute for local administration and urban development, he apparently concluded that this was a usurpation of his role and his institute. When plaintiff indicated his desire to be involved with this committee, Dean Dorrill appointed him to the committee and he began attending its meetings. Ultimately, however, Mark Wein-

berg was selected as coordinator and later as director of the institute which was finally known as the "Institute for Local Government Administration and Rural Development." The focus of the institute was away from the urban development interests of the plaintiff.

6. The selection of Weinberg by Dean Dorrill was not motivated by any consideration of plaintiff's national origin. Weinberg was the logical selection. He had excellent administrative skills and a fine academic record. Because he had been working on the project since 1976 and in a leadership role for several years, he was the most qualified person for the position of coordinator and director.

7. Plaintiff on the other hand, elected to leave the campus and spend two months in India during the summer of 1980 just when the final work on the project was being completed. Accordingly, plaintiff was not available to make a contribution during this crucial period of the committee's work. Furthermore, the National Science Foundation Funding Proposal plaintiff had prepared for his own institute had been rejected with critical comments by the NSF evaluators. For these and other reasons Dean Dorrill was justified in considering Mark Weinberg as better qualified for the position of coordinator and director of the new institute.

8. Dr. Vatel Rose, Chairman of the Department of Afro-American Studies was required to evaluate the faculty members under his supervision. In 1981 he originally evaluated the plaintiff at a level of six on a ten point scale. When Dean Dorrill received and reviewed Dr. Rose's faculty evaluations he felt that Dr. Rose had over-evaluated the plaintiff and he requested that Dr. Rose reconsider his evaluation. As a result, Dr. Rose did reconsider the plaintiff's evaluation and reduced it to a five. This resulted in some reduction of plaintiff's salary for the next teaching year.

9. Dean Dorrill asked Dr. Rose to re-evaluate not only the plaintiff, but two other department members and his reduction of the plaintiff's rating was based upon his review and reconsideration of the plaintiff's performance. There was no evidence that the actions of Dean Dorrill or Dr. Rose in any way were influenced by a consideration of plaintiff's national origin and the court finds that they were not.

10. In the summer of 1981, plaintiff planned to teach a graduate level course in Afro-American Studies, however, the course was cancelled because an insufficient number of fee-paying students signed up for the courses. After being advised of this fact by Associate Dean Borchert, plaintiff offered to teach the course without payment and proceeded to do so. Later plaintiff discovered that the College of Arts and Sciences had authorized an undergraduate course in Afro-American Studies that summer and the teacher of that course was paid even though the number of students who enrolled for the course did not meet the standard. However, there was a long standing policy to authorize the teaching of certain essential courses regardless of enrollment and this particular course qualified for such treatment. The course being taught by plainitff was not a course as such but a program of independent studies by a group of graduate students and plaintiff's course did not qualify for special treatment under the existing university policy. It is not unusual for faculty members to teach independent studies during the summer (or the rest of the year for the matter) without payment of salary on a voluntary basis. The cancellation of plaintiff's summer course and the non-payment for his teaching services was in no way related to his national origin.

11. On November 14, 1981, plaintiff was notified that his teaching contract would not be renewed beyond November of 1982. This decision was based upon the results of a standard evaluation procedure wherein a com-

mittee consisting of the chairman and two tenured faculty members of the Center for Afro-American Studies evaluated plaintiff's performance. Plaintiff was invited to appear before the committee, but he declined to do so. After reviewing the plaintiff's performance the committee recommended non-renewal. This recommendation was based upon lack of student enrollment in plaintiff's courses, plaintiff's failure to develop courses appropriate to the curriculum of Afro-American Studies and his lack of interest in reorienting his efforts toward Afro-American Studies. Plaintiff's national origin was not a factor in the committee's recommendation, nor in the decision of the dean to accept such recommendation.

12. In connection with plaintiff's evaluation for renewal or non-renewal of his teaching contract, the department of Afro-American Studies requested the dean's office to evaluate plaintiff's administrative performance. This task was assigned to Associate Dean Borchert who then proceeded to talk to various deans, department chairmen and faculty members who had worked with the plaintiff. Borchert also reviewed the plaintiff's personnel file and obtained direct input from Dean Dorrill. He then prepared a letter to Dr. Rose, Chairman of the Department of Afro-American Studies setting forth his findings. (Plaintiff's Exhibit 44). This letter is dated November 4. Associate Dean Borchert in the letter that the plaintiff had "failed entirely to demonstrate the qualities of leadership and administrative skill necessary." The facts reported in this letter are supported by the evidence adduced at the trial of this case.

13. On December 4, 1981, plaintiff submitted a formal grievance to Dean Dorrill wherein he outlined in considerable detail his version of the various events which had occurred since he arrived at Ohio University in January of 1980. In paragraph 39 of this grievance, plaintiff states that Dean Borchert's letter of November 4, 1981 "*does not contain a single truth.* A careful evaluation

of the evidence as presented in this document will justify my conviction." (Emphasis in the original). This grievance was received by Dean Dorrill who reviewed it at length with the assistance of Associate Dean Borchart. Plaintiff was given a written reply dated January 4, 1982. (Joint Exhibit 4). Plaintiff's grievance was treated as a non-reappointment grievance under Section II(D)(6) of the Faculty Handbook of Ohio University. Dean Dorrill responded in detail to each of the allegations contained in the plaintiff's grievance and concluded by stating:

> Having assessed very carefully your submitted materials relative to your non-reappointment grievance, I am led to the conclusion that your claims of broken commitments and conspiracy are without foundation in fact, and that your grievance merits no redress.

14. After receiving Dean Dorrill's response to this grievance, plaintiff appealed the matter to the Provost, Dr. James Burning, who asked Associate Provost, Dr. David Stewart, to assist him in reviewing the plaintff's grievance and the dean's response. Dr. Stewart carefully reviewed and analyzed both documents and reported to the provost recommending that the dean's decision be sustained. The provost concluded that there were no grounds for the grievance and responded to the plaintiff in writing informing him that he concurred with Dean Dorrill's response to his grievance. (Joint Exhibit 5).

15. Plaintiff then appealed his grievance to the faculty senate. The appeal was referred to Dr. Calvin Thayer, Chairman of the Promotion and Tenure Committee. Dr. Thayer's committee thoroughly investigated plaintiff's grievance to determine whether or not there had been a violation of academic freedom a failure to adequately consider his complaints or a violation of due process. A meeting was scheduled with the plaintiff and all eight

committee members attended and asked questions. The committee then conducted its own investigation and personally interviewed Dean Porter, Professor Rose, Dean Borchert, Dean Dorrill and others. The committee then met privately and deliberated on the issues raised by the plaintiff. Altogether the committee met twelve to fifteen times. On May 17, 1982, it issued its report to the chairman of the faculty senate finding no substantive violation of the plaintiff's rights under the faculty handbook. The decision of the committee was unanimous.

16. Plaintiff's grievance was handled in accordance with the procedures outlined in the Faculty Handbook of Ohio University. Plaintiff's complaints received the attention and consideration of the dean of his college, the provost of the university and the faculty senate and he was accorded due process with respect to the issues raised.

17. On July 24, 1981, plaintiff wrote a letter to Dr. Rose complaining about the reduction of his faculty evaluation rating and on the same date, he wrote to Associate Dean Borchert objecting to the cancellation of his summer course and requesting payment for teaching it. Plaintiff characterizes these letters as grievances. He was not satisfied with the responses he received to either letter and brought these matters to the attention of Dean Dorrill in a meeting in August of 1981. In August, he also wrote to Acting Provost, James Bruning, regarding the non-payment of summer teaching. Plaintiff claims that Dean Dorrill threatened him with termination for filing these grievances and further alleges that the non-renewal of his teaching contract was in retaliation for filing these grievances. The evidence established, however, that the non-renewal of plaintiff's teaching contract was based upon the recommendation of the committee appointed for that purpose and that the committee based its recommendation on the factors outlined in paragraph 11 above. The court finds that there

was no causal relationship between plaintiff's grievances of July 24th and August 6th and the non-renewal of his teaching contract.

CONCLUSIONS OF LAW

1. In order to prevail in an action brought under 42 U.S.C. § 1981, the plaintiff must prove by a preponderance of the evidence that he is a member of a protected class, that he has been injured by some unfavorable action by the employer and that the unfavorable action was taken because of the plaintiff's race or national origin. See: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff must prove that the defendant intended to discriminate against him on the basis of race or national origin. *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 3575 (1982); *Saint Francis College v. Al-Kharraji, 107 S. Ct. 2022 (1987).*

2. Plaintiff may establish a *prima facie* case by proving facts which give rise to an inference of unfavorable treatment as a result of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the particular employment decision in question and upon doing so, plaintiff, in order to sustain his burden of proof, must show that the nondiscriminatory reason given by the defendant was a mere pretext for discrimination. *Firnco Construction Corp. v. Waters*, 438 U.S. 567, (1978); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

3. The order and allocation of proof applicable in a Title VII disparate treatment analysis may be utilized in adjudicating claims arising under 42 U.S.C. §§ 1981, 1983, *Daniels v. Board of Education*, 805 F.2d 203 (6th Cir. 1986). The plaintiff can show discrimination based

upon race or national origin if he were treated differently than similarly situated non-minority employees under the same or similar circumstances or if plaintiff can prove any other fact or circumstance which would give rise to an inference that his treatment by the defendants was racially motivated.

4. Plaintiff did not show that the defendants engaged in a pattern of racial discrimination. See: *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). Nor did plaintiff prove any facts that would give rise to an inference that the negative employment decisions of which he complains were motivated by discrimination based upon his national origin.

5. Assuming *arguendo* that plaintiff did establish a *prima facie* case as to refusal to renew his contract, reduction of his rating, refusal to pay for summer teaching and refused to appoint him as coordinator for the Institute for Local Administration Rural Development, the court finds that in each instance defendants have articulated a valid, nondiscriminatory reason for the actions taken and that the plaintiff has failed to provide any evidence whatsoever that the reasons given were a pretext for discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Burdine*, 450 U.S. at 233.

6. In order to state a claim for retaliation for the exercise of a First Amendment right, the plaintiff must first establish that his conduct deserves constitutional protection. This is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138 (1983). The court holds that filing a grievance in the form of letters to Dean Dorrill and Dr. Rose in July, 1981 and to Acting Provost Bruning in August, 1981, is akin to filing a lawsuit and is a species of the First Amendment right to petition. *Graham v. National Collegiate Athletic Association*, 804 F. 2d 953 (6th Cir. 1986); *Harrison v.*

Springdale Water & Sewer Commisison, 780 F. 2d 1422 (8th Cir. 1986).

7. Since the court finds that Dr. Ghosh's conduct was protected by the First Amendment, it must determine whether there is any evidence that negative actions were taken against him because he engaged in the protected conduct. The plaintiff has the burden of proving that his exercise of protected First Amendment rights was a "motivating or substantial factor" in the employer's adverse employment decisions. If the employee meets this burden of proof, then the defendants must prove by a preponderance of the evidence that any actions taken against the employee would have taken place anyway. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Hildebrand v. Board of Trustees of Michigan State University*, 662 F. 2d 439 (6th Cir. 1981), *cert. denied* 456 U.S. 910 (1982); *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983).

8. The court finds that the plaintiff failed to produce probative evidence from which the court could find that his protected First Amendment activity was a substantial factor in the defendants' decisions. Even if plaintiff had met this initial burden of proof, the court finds that the defendants proved by a preponderance of the evidence that their decisions would have been made despite the plaintiff's protected First Amendment activity.

9. In our previous rulings, this court has held that even though plaintiff requested compensatory and punitive damages, the Eleventh Amendment forbids award of any such damage or legal relief against the particular defendants in this suit. Because only equitable relief is available, this court ruled that plaintiff is not entitled to a jury trial. *Hildebrand, supra; Harris v. Richards Mfg. Co., Inc.*, 675 F.2d 811 (6th Cir. 1982); *Moore v. Sun Oil Co.*, 636 F.2d 154 (6th Cir. 1980); *Lynch v. Pan American World Airways, Inc.*, 475 F. 2d 764 (5th Cir. 1973).

10. Under Fed. R. Civ. P. 50(a), a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476 (1943). Before the evidence can be submitted to the jury, there is a preliminary question for the judge whether there is sufficient evidence upon which a jury could proceed to find for the party who has the burden of proof. *Improvement Co. v. Munson*, 14 Wall 442 (1872), *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

11. The Court finds that the plaintiff has failed to produce sufficient evidence with respect to his § 1981 or First Amendment claims to submit these claims to a jury. As a result, this Court would have directed a verdict for the defendants on these issues in the event this case had been tried to a jury.

12. Plaintiff has alleged a violation of his liberty interests without due process because of Dr. Borchert's November 4, 1981 letter to Dr. Rose evaluating plaintiff's administrative skills. (Plaintiff's Exhibit 44). Whether or not the letter implicates a liberty interest is a question of law for the court. Nothing in this letter implicates the plaintiff's reputation and honor in the community sufficiently to implicate a liberty interest. Furthermore, the information is cumulative and substantiated by the record. *Roth v. Board of Regents*, 408 U.S. 564 (1972); *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986); *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976); *Kendall v. Board of Education of Memphis City*, 627 F.2d 1 (6th Cir. 1980); *Stratten v. Wadsworth Veterans Hospital*, 537 F.2d 361 (9th Cir. 1976).

13. Plaintiff presented no evidence that defendants have actively sought to discredit him to future employees, *cf.*, *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986).

The court finds that the plaintiff's contract was not renewed because of constitutionally valid reasons and that the plaintiff's liberty interests were not implicated. Therefore, no due process hearing is legally required. *Roth, supra.*

14. If a liberty interest had been implicated, plaintiff would be entitled to notice and an "opportunity to refute the charges before university officials." *Lake Michigan, supra* at 1096. Plaintiff received several opportunities to refuse the allegations of Dr. Borchert's letter. Therefore, even if a liberty interest had been violated, due process was given to the plaintiff.

15. The plaintiff is entitled by the terms of his contract to the procedures listed in the Faculty Handbook. (Defendants' Exhibit Q). The Court finds that the university complied with procedures set out in the handbook.

CONCLUSION

Other than plaintiff's deeply felt beliefs, there is no evidence before this Court to suggest that the employment decisions of which he complains were based on discrimination because of his national origin or that they were in retaliation for his letters in July and August, 1981 or the more formal grievance filed in December of that year.

ORDER

The clerk shall enter final judgment herein against the plaintiff and in favor of the defendants. The costs of this action are assessed against the plaintiff.

/s/ James I. Graham
JAMES I. GRAHAM
United States District Judge

Date: August 26, 1987